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A DIGEST  
OF THE  
HINDU LAW  
OF  
INHERITANCE, PARTITION, AND ADOPTION;  
EMBODYING THE REPLIES OF THE ŚÂSTRIS  
IN THE COURTS OF THE BOMBAY PRESIDENCY,  
WITH  
INTRODUCTIONS AND NOTES  
BY  
RAYMOND WEST  
AND  
JOHANN GEORG BÜHLER.

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**BOOK II.**

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**THE LAW OF PARTITION.**





## BOOK II.—PARTITION.

## INTRODUCTION.

## DEFINITION.

§ 1. THE Law of Partition is the aggregate of the rules, which, when a Hindû family, (a) living in union, separates, determine the duties and rights of its several members with respect to the common property and liabilities. (b) The

(a) In the case of *Raj Bahadur v. Bishen Dayal*, I. L. R. 4 All. 343, it was recently held that the Hindû law applies of its own force only to an orthodox Hindû. This rule literally applied would exclude from the operation of the Hindû law Jains, Lingâyats, and other sects of dissenters. But Hindûism is a matter of race as well as of religion, and the Hindû law, as we have seen, allows all classes of Hindûs to be governed by their own customs when these differ from the general law. This is the basis of the customary law of castes (see *Mathurd Naikin v. Esu Naikin*, I. L. R. 4 Bom. 545), according to the Hindû view of the matter, and the indulgence extends even to the established usage of a family. In the case referred to, the High Court at Allahabad found a similar rule applicable to a Hindû family half-converted to Mahomedanism, as a law of "justice, equity and good conscience," and upheld a claim for partition according to the Hindû law, because as to inheritance the family had adhered to that law. The case of *Abraham v. Abraham*, 9 M. I. A. 195, is cited, but that of the Khojas and Memons, *Perry, Oriental Cases*, 110, is not referred to. Cutchi Memons and Khojas retain by custom some Hindû laws of Inheritance, but are otherwise governed by the Mahomedan law; in *re Haji Ismail*, I. L. R. 6 Bom. 452; *Ahmedbhoy Hubibhoy v. Valleebhoy Casumbhoy*, *id.* 703. Mere apostasy does not free from the Hindû marriage-law. See *Government of Bombay v. Ganga*, I. L. R. 4 Bom. 330; Act. XXI. of 1866. In Madras a view has been taken which would enable an association for almost any purpose to give itself rules analogous to those of the ordinary Hindû law. See below the case of the dancing women.

(b) By the Civil Law, partition is regarded as a kind of exchange. Hence an hypothecation of any share, validly created, subsists on all the shares after partition. "The doctrine of the old French law was, on the other hand, that a partition had no relation either to the contract of exchange, or to the contract of sale; that it was not in the nature of a purchase-deed (*titre d' acquisition*), but only had the

basis of this law is the family. Property in common is regarded as an attribute or consequence of the relation of community of origin, not union of property as the source of the rights and duties of the co-sharers. A mere association in estate (a) will not make the subjects of it members of a

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effect of determining and limiting to certain subjects the indefinite share which, before the partition, each co-heir or other co-proprietor had, in the mass of the property, divided. According to the distinction to be found in the writings of so many French Jurists and in the Code itself, the instrument of partition was '*un acte déclaratif*,' not '*un acte translatif de propriété*,' P. C. in *Courtaux v. Hewetson*, L. R. 6 P. C. at p. 412; Poth. Tr. de V. Pt. VII. Art. 6, 7.

The former of these two theories somewhat resembles that of the Bengal law, as given in the *Dāya Bhāga*, Chap. I. paras. 8, 35 (Stokes, H. L. B. 184, 193). The ownership of sons arises, according to *Jīmūtavāhana* (para. 14), only on the death of their father, and there exists *per my et non per tout*, 'a several though unascertained right in each co-parcener' (1 Macn. H. L. 5), being as to each limited to a particular share, which is merely distinguished individually from the others by the act of partition, see *Jagannātha* in *Coleb. Dig. Book V. T. 2 Comm.*; 1 Str. H. L. 201. This view is contested by the *Vīramitrodaya*, Transl. p. 2, and by some even of the Bengal writers, as may be seen from *Colebrooke's* notes, but on it rests the recognised right of an undivided co-parcener to deal with his own share by way of sale or mortgage. The *Mitāksharā* on the other hand assigns to the sons a common ownership with their father by birth (*Mit. Chap. I. Sec. 1, para. 23*; Stokes, H. L. B. 374), which extends, in the case of each co-sharer, to the whole, so as to prevent any one singly from dealing even with a part (para. 30; 1 Macn. H. L. 5), and then partition is the mutually exclusive concentration on particular portions of the individual ownerships previously extending in mutual concurrence over the whole property (para. 4). Compare the *Smṛiti Chandrikā*, Chap. XII. para. 9, and the *Vīramitrodaya*, Transl. p. 3, 19, 42. On the death of a parcener "without male issue, his share becomes extinct, because no partition has taken place in the family, and there has consequently been no ascertainment of the share of each parcener." See *Udaram Sitaram v. Ranu Pandoji*, 11 Bom. H. C. R. 76; *Narsinhbhat v. Chenapa Ningapa*, S. A. No. 205 of 1877, Bom. H. C. P. J. F. for 1877, p. 329.

(a) The mutual relations of members of a united family are sharply distinguished from those of mere partners, *Samalbhai v. Someshwar et*



joint family, but their being members of a joint family makes their estate and their acquisitions, except in special cases, common property. (a) The dissolution of the union makes joint property in this sense impossible except after a re-union. Separate rights of the members take the place of the undiscriminated common right, and the shares are determined according to the branches and sub-branches proceeding *inter se* from the common stem. (b)

The Mitāksharā, (Chap. I. Sec. I. para. 13) explaining the familiar text as to the sources of ownership, says that Inheritance "relates to unobstructed and Partition to obstructed inheritance." The exposition in the Vīramitrodaya is that "unobstructed" relates to a right of ownership actually subsisting in the lifetime of one from relationship to whom it arises, and "obstructed" to one only ready to come into existence on the death of the obstructing owner, or a

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*al*, I. L. R. 5 Bom. 40; and the Vīram. quoted below, though the association of the latter is recognized as much more intimate than under the European laws. Partnership however must now be governed by the Indian Contract Act. IX. of 1872. On the division of a caste the Courts have sometimes declined jurisdiction in a quarrel concerning a partition of the caste property, as being a caste question excluded from cognizance by Reg. 2 of 1827, Sec. 21, see *Girdhar v. Kalya*, I. L. R. 5 Bom. 83. As to the last point see Act XIV. of 1882, Sec. 11, and *Vasudeo v. Vamnaji*, I. L. R. 5 Bom. 80. Without such a provision the decisions of the castes would be subject to revision by the King's Courts according to the Hindū law, see 2 Str. H. L. 267, and it is not infrequently a question whether a caste decision, so-called, has been properly arrived at; *Murāri v. Suba*, I. L. R. 6 Bom. 725. As to the incidental cognizance of a religious question, by a Civil Court reference may be made to *Krishnasami, v. Krishnama*, I. L. R. 5 Mad. p. 313, and to *Brown v. Curé of Montreal*, L. R. 6 P. C. p. 157; as also to *Dhurrum Singh v. Kissen Singh*, I. L. R. 7 Calc. 767.

(a) Comp. Laveleye, Prim. Prop. 181 ss.

(b) Comp. Maine, Early Hist. of Inst. p. 79, and *Ballabhdās v. Sundardās*, I. L. R. 1 All. 429. See the Vīram. Transl. p. 168, 162; Vyav. May. Chap. IV. Sec. 2.

partition by several such owners. Thus inheritance would apply to the sons taking collectively the aggregate patrimony, partition to collaterals taking the same estate, not previously vested in them, according to their shares, or a mother taking on a partition by sons. (a)

The intimate connexion of the laws relating to the two subjects has frequently been recognized. "Inheritance," in the sense of a right coming into active existence only at a preceding owner's death does not apply to the most frequent and important cases of inheritance under the Hindû law as conceived by the Mitâksharâ and its followers. The growth of a family is regarded as like the growth of a banyan tree, each new male offshoot of which immediately becomes a part of the whole, capable, when the parent stem perishes, of continuing the existence of the aggregate of which it then becomes the most important, perhaps the sole remaining element. The Hindû lawyers of the Western School accordingly treat of Partition under the title of Dâvavibhâga, regarding the contents of which *see* Introduction to Bk. I., pp. 57 ss.

Vijñāneśvara's definition of the word "Partition" is defective, (b) since it does not touch on the duties and liabilities of the co-parceners, which, as the subsequent treatment of this Title shows, are apportioned in the act of Partition just as clearly as the shares of the common property.

#### SUBDIVISION.

§ 2. The subjects which the law of Partition presents for consideration, therefore, are:—

- I. The family living in union,
- II. The separation of such a family,
- III. The common property to be distributed,

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(a) *See* above, p. 67; and below, Bk. II. Chap. II. Sec. 2. *See also* the Mâdhaviya, pp. 4 ss.

(b) *See* Mit. Chap. I. Sec. 1, para. 4.

#### IV. The common liabilities to be distributed, and

#### V. The duties and rights arising from the separation.

The evidence of Partition, though it forms strictly no part of the law of Partition, may be included under this head for convenience sake, and in deference to the custom of the Hindû lawyers, who always treat it under this title.

#### I. THE FAMILY LIVING IN UNION.

§ 3. The normal state of a Hindû family is one of union. (a) The rule holds as to the family of a Śûdra in

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(a) *Gobind Chundar Mookerjee v. Doorga Parsad Baboo*, 22 C. W. R. 248, and the cases there cited by Sir R. Couch, C. J.

“The common abode of brethren is preferable while the parents are alive, as likewise after their death,” Viram. Tr. p. 52. “But if increase of religious merit (by sacrifices) be desired, then partition should be made.” *Ib.* See *Neelkisto Deb. v. Beer Chunder Thakoor*, 12 M. I. A. at p. 540.

As to the case of a younger brother gradually admitted by the elder to a participation in his business, see the reply of the Śāstris in *Abraham v. Abraham*, 9 M. I. A. at p. 235; *Vedavalli v. Nārāyana*, I. L. R. 2 Mad. 19. See Maine, *Anc. Law*, Chap. VIII. p. 261 ss. In *Boologam v. Swenam*, I. L. R. 4 Mad. 331, and some other cases it seems to be held that dancing girls living chiefly by prostitution are capable of forming a joint family. The invested earnings of two sisters were held not to be “gains of science” partible with the rest of the family, but self-acquired impartible property of the two gainers. A true joint family could not possibly spring from a prostitute mother, but the family might possibly “constitute themselves parceners after the manner of a Hindû joint family,” as in the case cited above, p. 4, (g).

Joint tenancy under the English law arises only from some act of the parties (see Cruise, Dig. Tit. XVIII. Chap. 1): joint tenancy by inheritance is not recognized, though co-parcenership is. The joint estate of a united Hindû family differs in some respects from both. Thus, the co-sharers, unlike English co-parceners, have, under the Mitāksharā, an entirety of interest, and along with a limited representation (*supra* pp. 65 ss.) there is a *jus accrescendi*. On the other hand a joint tenant can dispose of his own share, and thus sever the joint tenancy, which the Mitāksharā does not allow without the assent of



which illegitimate sons are members equally with those who are legitimate, though entitled on partition to only one half of the shares taken by the latter. (a)

The group thus constituted is in most of its civil relations to those outside it regarded as a social unit with common interests and duties as well as in typical cases common sacrifices and a common household. In such a group, membership of which may be abandoned, as unanimity cannot in all things be secured, the predominant will must be that of the greater number or of those who can exert the greater energy. Thus it was said that a majority of united brothers may deal with the estate even by way of alienation of part of it for the obvious benefit of the whole. Where four brothers sold a small part to redeem a large one, the adopted son of the fifth brother was held bound by the transaction (b) though he had not assented to it. This is perhaps the necessary practical solution of the question arising from a conflict of wishes

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the other co-sharers in a united family. See for the present law pp. 167, 206, and *note*. Partition of a joint tenancy could not be enforced under the English common law prior to the Statutes of 31 and 32 Hen. VIII., but a writ of Partition was given to co-parceners by the Common Law.

To the intimate union of the Hindû family may be traced the widely spread *benami* system under which one person, usually a near relative, purchases property in the name of another. A father not distinguishing his own interests from those of his son, invests money or establishes a business in the name of the latter as born under a favouring star. Next comes a similar purchase for the purpose of securing the investment against future chances. Finally arises a system of fictitious ownership. The Courts, looking to the facts, decline to recognize generally in a purchase by a Hindû in the name of a son an intended advancement of the son as under the English law. The presumption is in favour of a purchase for the benefit of him who supplies the price. See *Naginbhai v. Abdulla*, I. L. R. 6 Bom. 717; *Gopu Krist Gosain v. Gunpersaud Gosain*, 6 M. I. A. 53; Indian Trusts Act. II. of 1882, Sec. 82.

(a) *Sadu v. Baiza and Genu*, I. L. R. 4 Bom. 37.

(b) *Ratnagiri*, 5th June 1852, M.S.

amongst co-equals. The doctrine of the older jurists, however, seems to have been that a complete consent of all concerned was requisite (a) to an effectual volition touching the common property or interests except in cases expressly provided for. (b) The need for unanimity in common acts is still so strongly felt that it is said the consent of all the co-heirs is requisite to justify expenditure from the common estate even for the funeral ceremonies of a father, (c) and the legal identity of the several members of the joint family is so complete under the law of the Mitâksharâ, that a single member cannot, according to the Śâstris and to Colebrooke, (d) deal directly with any part of the common property. His gift or bequest of any portion is inoperative (e).

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(a) See above, p. 221, note (c).

(b) See Bk. II. Chap. II., Sec 1, Q. 8; see below as to the cases, and also above, p. 289, note (a).

(c) Borradaile's Collection, Lithog. p. 37.

(d) 2 Str. H. L. 339, 432, 449.

(e) *Hurreewulabh Gungaram v. Keshowram Sheodass*, 2 Borr. 7; *Ichhdram v. Prumanund*, *ibid.* 515; *Vasudev Bhat v. Venkatesh Sanbhav*, 10 Bom. H. C. R. 139; *Gangubai v. Ramanna*, 3 *ibid.* 66 A. C. J. (gift to a daughter); *Rambhat v. Lakshman Chintaman*, 1. L. R. 5 Bom. 630; Coleb. Dig. Bk. V. T. 173, Comm.; *Smṛiti Chandrikâ*, Chap. VIII. page 20; *Ganga Bisheshar v. Pirthi Pal*, 1. L. R. 2 All. 635; *Chamaili Kuar v. Ram Prasad*, *ib.* 267; *Unooroop Tewary v. Lalla Bandhjee Suhay*, 1. L. R. 6 Calc. at p. 753. Sacrifices, to the completeness of which some expenditure is requisite, can be performed by any member of a united family only with the assent of the others. See the *Dharmasindusâra*, as quoted by Goldstücker (On the Deficiencies, &c., p. 40.) The *Vīramitrodaya*, concurring in the view that it is of the essence of a sacrifice to part with property that is distinctly one's own, says that notwithstanding the joint ownership of his sons a father may do this without their permission on account of his (administrative) independence and their dependence. *Mitramisra*, however, seems to think that where there is a proprietary right there may be, for sacrificial purposes at any rate, an effectual relinquishment of that right by the individual, though it be attended with sin. According to this view members of joint families would be free from obstruction in dealing with their own interests. *Vīram. Tr.*

Viśveśvara and Bālabhaṭṭa, in commenting on the *Mitāksharā*, Chap. I. Sec. 1, pl. 20 (Stokes, H. L. B. 373),

p. 14; *infra* Bk. II. Chap. I. Sec. 2, Q. 4. This is cited in *Lakshman. Dādā Naik v. Rāmchandra Dādā Naik*, L. R. 7 I. A. at p. 195, and the power of alienation is called "an exceptional doctrine established by modern jurisprudence." The subordinate joint ownership of the Hindū wife in her husband's estate does not interfere with his free disposal of it or confer any right of disposal on her, *see* *Vīram*. Transl. p. 165; *Coleb. Dig.* Bk. II. Chap. IV. T. 28, Comm.; 2 Str. H. L. 7, 16, though her maintenance must be provided for. In Bengal, however, she is recognized as entitled to a share against a purchaser in execution, *Badri Roy v. Bhawat N. Dobey*, I. L. R. 8 Calc. 649.

The consent of brethren is necessary to a gift at a mother's obsequies, 2 Str. H. L. 339, according to the Śāstri, on whose reply however *see* the Notes *loc. cit.* Thus a joint family can act only collectively. At 2 Str. H. L. 449 the Śāstri of the Recorder's Court, Bombay, says "An undivided family having no power individually, but collectively only, no member can, without the concurrence of all, express or implied, dispose of any thing," and such is the purport of the *Mit.* Chap. I. Sec. 1, para. 30; above, p. 478. *See also* *Chuckun Lall Singh v. Poran Chunder Singh*, 9 C. W. R. 483. "An individual cannot alien his real estate to the prejudice of his heirs," Sutherland in 2 Str. H. L. 13, 445. But an occupant under Government may, without assent of the heirs, resign his holding (*Arjuna v. Bhavan et al*, 4 Bom. H. C. R. 133 A. C. J.; *Davalatd et al v. Beru bin Yādoji et al*, *ibid.* 197 A. C. J.), on account of the special relations created by or constituting occupancy, *Gundo Shiddheshvar v. Mardan Sāheb*, 10 *ibid.* 423; *Gheldbāi v. Pranjivan*, 11 *ibid.* 222; *Tarachand v. Lakshman*, I. L. R. 1 Bom. 91. A member of an undivided family in Madras cannot sell even his own share save in an emergency, according to the cases quoted in the note to *Gangubāi v. Rāmānnā*, 3 Bom. H. C. R. at p. 68, A. C. J. But he has this power over what may come to his share in a partition according to *Villa Butten v. Yamēnamma*, 8 Mad. H. C. R. 6, and the cases cited by the Privy Council in *Suraj Bunsai Koer v. Sheo Prasad*, L. R. 6 I. A. at p. 101.

When one co-parcener had sued a stranger for part of the patrimony and failed, and a subsequent suit is brought by one elected manager in the name of all for the same property, a question of *res judicata* arises. Its proper solution may perhaps be referred to this, that the one who sued thereby set up a separate right, and having failed, cannot sue for it again; and as he could dispose effectually of his own interest this is to be deemed transferred to the defendant even

take this as unquestioned ; and the passage quoted below from Yājñavalkya (*see* PROPERTY NATURALLY INDIVISIBLE), shows that the author was still under the dominion, to some extent, of the notion of land being properly impartible, and of its being inalienable, at any rate, without the assent of every co-owner. (a) The language of the Privy Council is to the same effect with regard to the incapacity of a single member. (b) But Colebrooke having said that in case of an alienation for valuable consideration, "equity would perhaps award partition" to the alienee, (c) the Courts have allowed execution against the common property, to ascertain the undivided share and make it available to the creditor, whether expressly charged or not, and have even recognized the logical consequence (d) that a single coparcener may alien or incumber his own share for valuable consideration, though not gratuitously, (e) the vendor thus acquiring a right to a

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though the manager's suit should be successful. *See* Bréton. Const. de la chose Jugée. But a simpler solution is to be found in regarding the single sharer as an essentially different "persona" from the collective one, and the latter as not affected by the act of the former. A suit for property as allotted to the plaintiff in partition does not bar a subsequent suit for partition, *Shivram v. Narayan*, I. L. R. 5 Bom. 27.

(a) *See* Mit. Chap. I. Sec. 1, para. 30; Stokes, H. L. B. 376; and the *Vivāda Chintāmaṇi*, p. 309. *See* below, Sec. 5 B.

(b) *Musst. Cheetha v. B. Miheen*, 11 M. I. A. 369, quoted below. *See* too *Rambhat v. Lukshman*, I. L. R. 5 Bom. 630, *sub fin.* and the cases there quoted.

(c) *See* 2 Str. H. L. 350, 434.

(d) *See* *Ponnappa Pillai v. Pappuvāyyangār*, I. L. R. 4 Mad. at p. 56, *et seq.*

(e) *Vāsudeo Bhat v. Venkatesh Sanbhav*, 10 Bom. H. C. R. 139; *Rangapa v. Madyapa et al.*, S. A. No. 537 of 1873, Bom. H. C. P. J. F. for 1874, p. 171. The High Court of Bengal declined to accede to this principle in *Sadāburt Prasād v. Phoolbāsh Koer*, 3 B. L. R. 31, but as the liability of the share for its owner's debts has now been established by *Deen Dayal's* case, L. R. 4 I. A. 247, it would seem that the same consequences must follow in Bengal as elsewhere. *See* the

partition. (a) Whether before a partition of interests agreed to by the parties or decreed by a Court, the purchaser's right is more than an inchoate one seems doubtful. The purchaser is said to become a tenant in common, (b) but still his right has to be worked out by partition, (c) and it may be said that until the partition of interests is completed there is no individual interest on which the alienation can take effect, (d) or which will not become absorbed by survivorship on the sharer's death. (e) The view of the Judicial Com-

remarks of the Judicial Committee in *Suraj Bunsî Koer v. Sheo Prasad*, L. R. 6 I. A. at pp. 102, 104. In *Musst. Phoobash Koonwar v. Lalla Jogeshwar Sahay*, their Lordships expressly refrained from deciding this question, see L. R. 4 I. A. 7, 21, 26, 27, but in *Suraj Bunsî Koer's* case it is clearly laid down that even on a bond which could not have been enforced after the obligor's death against his co-sharers (in that case sons) an attachment and order for sale create a charge in favour of the judgment creditor on his debtor's undivided interest which is not extinguished by the debtor's subsequent death and his brother's survivorship. In Madras a decree obtained against a member of a united family does not, according to *Ravi Varma v. Koman*, I. L. R. 5 Mad. 223, bind the family property in the hands of the other members after his death. "The interest," it was said, "survived to the other members," and did not "enure as assets of the deceased in the hands of the appellant." In the case however of a father succeeded by sons the Judicial Committee have declared that the estate taken by the latter is assets for paying the debts of the former, see above pp. 167, 207, and as to attachment in execution see below, note (e).

(a) *Udârâm Sitârâm v. Rânu Panduji et al*, 11 Bom. H. C. R. 76; *Palanivelappa Kaundan v. Maundru Nâikan et al*, 2 Mad. H. C. R. 416; *Sitârâm Chandrashekhar v. Sitârâm Abâji*, S. A. No. 379 of 1874, Bom. H. C. P. J. F. for 1875, p. 140; *Mâhâdoo bin Jâniâ v. Shridhar Bâbâji*, Bom. H. C. P. J. F. for 1874, p. 114; and *Vrijabhukhandâs Kirpârâm v. Kirpârâm Govandâs*, Bom. H. C. P. J. F. for 1879, p. 263.

(b) *Uddârâm Sitârâm v. Rânu Panduji*, 11 Bom. H. C. R. at p. 81.

(c) *Ib.* 72; above, p. 168. A decree for partition does not, it was said, effect a severance so long as it is under appeal, *Sakhârâm Mahâdev v. Hari Krishna*, I. L. R. 6 Bom. 113.

(d) See *Ravi Varma v. Koman*, I. L. R. 5 Mad. 223, cited below.

(e) See *Suraj Bunsî Koer v. Sheo Prasad*, L. R. 6 I. A. at p. 109, and comp. *Kotta Râmasami Chetty v. Bangari Sêsham Nâayanivâru*,

mittee however appears to be that an attachment in execution creates a charge. (a) See further on this subject below, SEPARATION, Bk. II., Introd. Sec. 4 C, Sec. 5 A, Sec. 6 A.

Where one of the members of a joint family has disappeared those who remain may deal with the common property in any way consistent with good faith (b).

One only of two or more united co-parceners cannot enhance rent against the will of another, or oust a tenant of the family (c), or recover his own estimated fractional

I. L. R. 3 Mad. at p. 167; *B. Krishna Ráu v. Lakshmana Shanbhogue*, I. L. R. 4 Mad. at p. 306, where it is considered that attachment for sale of a coparcener's share severs his interest so as to make it available in case of his death before satisfaction of the decree. If a distinct charge on the common estate is thus constituted it may admit of question whether that is quite consistent with the decree for ousting the purchaser in execution of a manager's share in *Maruti Narayan v. Lilachand*, I. L. R. 6 Bom. 564. Property sold or attached under a decree against a father stands on a peculiar footing, which is discussed below.

(a) *Suraj Bansi Koer v. Sheo Prashad*, *supra*, and *O. Goorova Butten v. C. Narainsawmy*, 8 Mad. H. C. R. 13.

(b) *Rámchandra Sadashiv v. Bagaji Bachaji*, Bom. H. C. P. J. F. for 1878, p. 134.

(c) *Krishnardo Jahágirdár v. Govind Trimbak*, 12 Bom. H. C. R. 85; *Madhavrav v. Satyana et al*, S. A. No. 225 of 1875, Bom. H. C. P. J. F. for 1876, p. 8; but see also *Krishna Rav et al v. Manaji et al*, 11 Bom. H. C. R. 106. Under the English Law it was held that any one of several joint landlords could by notice end a tenancy, *Doe v. Summerset*, 1 B. & Ad. 135, *Doe v. Hughes*, 7 M. & W. 139. The tenancy seems to be regarded as dependent on a continuous and complete volition, while in India the relation created by contract has usually been treated as requiring a new and complete volition to change it.

Thus one of several co-owners even after a partition of interests without a physical distribution of the estate, cannot, without the assent of the others, increase the rent of tenants or eject them. *Báláji Bhikáji Pingé v. Gopal bin Rághu Kuli*, I. L. R. 3 Bom. 23; *Guni Mahomed v. Moran*, I. L. R. 4 Calc. 96; *Rághu bin Ambu v. Govind Bahirao and others*, Bom. H. C. P. J. for 1879, p. 446. Notice by some co-sharers only of enchancement of rent has in Bengal been held sufficient; see *Chuni Singh v. Hera Mahto*, I. L. R. 7 Calc. 633.

share of the joint property from a stranger. (a) He cannot alone sue to set aside a charge created by another (b).

“The rights of the coparceners in an undivided Hindû family governed by the law of the Mitāksharâ, which consists

But the decision was by three judges against two. *Comp. Gopal v. Macnaghten*, *ib.* 751; *Akojee v. Vadelal*, Bom. H. C. P. J. 1882, p. 320.

According to the English common law a compulsion needs the concurrence of all entitled, see *Attwood v. Ernest*, 13 C. B. 881, compared with the cases above cited; but an acceptance or assent may be by one, *Husband v. Davis*, 10 C. B. 645. *Comp. Krishnarao v. Manajee*, 11 Bom. H. C. R. 106.

Some only of the sharers were allowed, contrary to the wish of another sharer, to eject an intruder in *Radha Prashad Wasti v. Esuf*, I. L. R. 7 Calc. 414. In Bombay it would perhaps be held that the outsider holding with the assent of a sharer was in the same position as if put into possession by him. See *Mahabala v. Timaya*, 12 Bom. H. C. R. 138. In *Reasut Hossein v. Chorvar Singh*, I. L. R. 7 Calc. 470, it was held that some only of several joint lessors could not take advantage of a condition of re-entry. See also *Alam Manjee v. Ashad Ali*, 16 C. W. R. 138; *Gokool Pershad v. Etwari Mahto*, 20 C. W. R. 138; *Nundun Lall v. Lloyd*, 22 C. W. R. 74 C. R. In *Kattusheri Pishareth Kanna Pisharody v. Vallotil Manakel Narayanan*, I. L. R. 3 Mad. 234, it is said that all interested in pressing the claim must be joined as plaintiffs, or if they refuse, as defendants. See Code of Civ. Proc. Sec. 26, 28, 32; Indian Contract Act IX. of 1872, Sec. 45; and compare *Alexander v. Mullins*, 2 Russ. & M. 568.

The same general principle is recognized in *Krishnamma v. Gangarao*, I. L. R. 5 Mad. 229, in which it was held that one of several sharers of a village could not enforce on a tenant a patta (memorandum of rent payable) for his separate share of the total rent due by the tenant for his holding. In *Kalidas Kevaldas v. Chotalal et al*, Bom. H. C. P. J. 1883, p. 31, it was ruled that all the members of a united family must be joined as plaintiffs in a suit for a trade debt. An express assent to a suit by a manager was held insufficient. Reference is made to *Ramsebuk v. Ramlal Kundoo*, I. L. R. 6 Cal. 805, and *Dularchund v. Balramdas*, I. L. R. 1 All. 454.

(a) *Nathuni Mahton v. Manraj Mahton*, I. L. R. 2 Calc. 149.

(b) See *Rajaram v. Luchman*, 12 C. W. R. p. 478, cited and approved in *Mussumut Phoolbas Koonour v. Lalla Jogeshwar Sahoy*, L. R. 3 I. A. at p. 26. The greater force of the prohibitive than of the active element in a composite will is generally recognized. Goudsmit, Pand. 75.

of a father and his sons, do not differ from those of coparceners in a like family which consists of undivided brethren, except so far as they are affected by the peculiar obligation of paying their father's debts, which the Hindû law imposes upon sons, and the fact that the father is in all cases naturally, and in the case of infant sons necessarily, the manager of the joint family estate." (a)

The joint family is usually represented in external transactions by a managing member or members. The managership naturally belongs to a father during his life and capacity for affairs, and then to the eldest member qualified. (b) The elder brother may take the management, unless the others intimate their dissent. (c) A manager's right to bind the family estate by transactions or by charitable gifts rests on the consent, express or implied, of the members. (d) The manager's transactions for the common benefit bind the several members in favor of one dealing with him in good

(a) *Suraj Bansi Koer v. Sheo Prasad Singh*, L. R. 6 I. A. 88, 100. The "obligation" arises, according to the Hindu authorities, only on the father's death. See below.

(b) Steele, L. C. 153, 178; Manu IV. 184; *Bhaoo Appajee Powar v. Khandojee wulud Appajee Powar*, 9 Harr. 106; *Bulâkhdâss v. Ghama*, Bom. H. C. P. J. for 1880, p. 224; *Bhâgirthibâi v. Sadâshivâv Venkatesh*, Bom. H. C. P. J. for 1881, p. 155; *Suraj Bansi Koer v. Sheo Proshad Singh*, L. R. 6 I. A. at p. 101; *Bâbâji Mâludâji v. Krishnâji Devji*, I. L. R. 2 Bom. 666. These cases show also what is comprehended in a "family necessity." For further texts see Vyav. May. Ch. IV. Sec. IV. para. 7.

(c) Steele, L. C. 53; 2 Str. H. L. 331.

(d) 2 Str. H. L. 333, 335, 339, 342. On the peculiar position of the manager according to Hindu law, reference may be made to *Chuckun Lall Singh v. Poran Chunder Singh*, 9 C. W. R. 483; and *S. M. Ranganamani Dâsi v. Kasinath Dutt*, 3 B. L. R. 1 O. C. J. See also below, V. Sec. 7 A. A certificate to collect debts under Act XXVII. of 1860 may be refused to a Karnavam (or manager) of a Malabar Tarwâd to whom the members refuse their confidence on account of his being a judgment debtor to the Tarwâd, *Madhava Panikar v. Govind Panikar*, I. L. R. 5 Mad. 4. Comp. Steele, L. C. p. 54.



faith, (a) a want of which may be indicated by the unusual character of the transaction. (b) A lessee from one member as manager is not discharged by a receipt for rent passed to him by another member, (c) though under a lease from the

(a) *Aushutosday v. Moheschunder Dutt et al*, 1 Fult. at p. 382; *Tándavardya Mudali v. Valli Ammal*, 1 Mad. H. C. R. 398; *Davlatráo Máne v. Narayanráo Máne*, R. A. No. 51 of 1876, Bom. H. C. P. J. F. for 1877, p. 175; *Gundo Mahadev v. Rámabhat*, 1 Bom. H. C. R. 39; *Nahálchand et al v. Magan Pitámbar*, Bom. H. C. P. J. F. for 1879, p. 332; *Johurra Bibee v. Sree Gopal Misser*, I. L. R. 1 Calc. 470; *Náráyanráo Dámodar v. Bákrishna Mahádev Gadre*, Bom. H. C. P. J. F. for 1881, p. 298; *Ohuni Singh v. Hera Mahto*, I. L. R. 7 Calc. at p. 642. See Coleb. Dig. Bk. II. Chap. IV. T. 54, Comm. *ad fin*; 2 Strange, H. L. 342, 343; *Kasheekishore Roy v. Alip Mundul*, I. L. R. 6 Calc. 149.

(b) *Báji Shámráj v. Deo bin Báldji*, Bom. H. C. P. J. F. for 1879, p. 238; 1 Str. H. L. 202; see *Hanuman Prasad Panday v. Babooes Munraj Koonweree*, 6 M. I. A. at p. 412, and *Kottu Ramasámi Chetti v. Bangári Séshama*, I. L. R. 3 Mad. at p. 164 *et seq.*, and *Ponambilath Parapravan Kunhamod Hajee v. Ponambilath Parapravan Kuttiath Hajee*, *ib.* 169.

(c) *Dada Ravji v. Bhau Ganu*, S. A. No. 279 of 1875, Bom. H. C. P. J. F. for 1876, p. 11; *Poshun Ram et al v. Bhowanee Deen Sookool et al*, 24 C. W. R. 319. See *Sangáppá v. Sáhebánna*, 7 Bom. H. C. R. 141 A. C. J., and *Krishnaráo Rámchandra v. Mánáji bin Sayáji*, 11 B. H. C. R. 106, 110; *Akoji Gopal v. Hirachand*, Bom. H. C. P. J. 1882, p. 320; *Jadoo Shat v. Kadumbinee Dassee*, I. L. R. 7 Calc. 150; and Coleb. Dig. Bk. II. Chap. IV. T. 54 Comm. *ad fin*. For the English law see *Robinson v. Hoffman*, 4 Bi. 562, and *Leigh v. Shepherd*, 2 Br. and Bi. 465; *Doe Dem Green v. Baker*, 8 Taunt. 241.

Payment to one of several co-sharers frees the tenant as shown in *Krishnaráo Rámchandra v. Mánáji bin Sayáji*, 11 Bom. H. C. R. 106. A suit by one co-creditor, except on the ground of collusion of a co-creditor with the debtor, cannot in general be maintained under the English law, but he can give an effectual discharge; and under the systems derived from the Roman Law he may sue alone for the whole. See Evans's Pothier, I. 144, II. 55 ss. As to debtors *in solido* one may properly represent all in paying but not in resisting payment, or in making adverse admissions or a compromise, see Evans's Poth. II. 67. All co-sharers must be served with notice of intended foreclosure,

members jointly he is. As to the limitations on a manager's authority, see *Gopalnarain v. Muddomutty*, (a) *S. Sreemutty v. Lukhee Narain Dutt et al*, (b) and *Suraj Bunsu Koer's case*, *supra*. A widow managing for her infant son, like any other manager when minors are interested as co-parceners, (c) can deal with the property only to meet existing necessities, but the other party is protected by good faith and reasonable inquiry, (d) and in *Trimbak v. Gopal Shet* (e) good faith and reasonable inquiry seem to have been thought enough to justify and validate transactions with a member only supposed to be a manager acting for the common interest of

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*Norender Narain v. Dwarka Lall*, L. R. 5 I. A. 18. Under the Indian Contract Act IX. of 1872, Sec. 43, any one of several joint promisors may be compelled to perform the whole promise and may then force the others to contribute. Whether a group of successors however is in this position seems at least doubtful. The Hindû law does not seem to impose any "solidarity" of obligation on them except as members of a united family. Comp. *Doorga Persad v. Kesko Persad Singh*, L. R. 9 I. A. 27, 31.

The co-sharers who have colluded with a tenant to defraud a co-sharer may on that ground be sued by him in common with the tenant for the share of the rent due to the plaintiff, *Doorga Churn Surmah v. Jampa Dossee*, 21 C. W. R. 46, and *Kalee Churn Singh v. E. Solano et al*, 24 C. W. R. 267, and see *Akoji Gopal v. Hirachand*, Bom. H. C. P. J. 1882, p. 320.

(a) 14 B. L. R. 21, 49 (not perhaps quite assented to in Bombay).

(b) 22 C. W. R. 171.

(c) See *Saravana Tevan v. Muttiayi Ammal*, 6 Mad. H. C. R. at p. 371. *Durgapersad v. Kesko Persad Singh*, I. L. R. 8 Calc. at pp. 661-662; S. C. L. R. 9 I. A. 27. See Steele, L. C. p. 174-5.

(d) *Hunoomanpersaud Panday v. Musst. Babooee Munraj Koonweree*, 6 M. I. A. 393; *C. Colum Comara Vencatachella Reddyar v. R. Run-gasawmy S. J. Bahadoor*, 8 *ibid.* at p. 323; *Dalpatsing v. Nandabhai et al*, 2 Bom. H. C. R. 306; *Kashinath v. Dadki et al*, 6 *ibid.* 211 A. C. J.; *Bai Kesar v. Bai Gangá et al*, 8 *ibid.* 31 A. C. J.; *Bai Amrit v. Bai Manik*, 12 *ibid.* 79; *Saravana Tevan v. Muttiayi Ammal*, *supra*; *Ratnam v. Govindarajula*, I. L. R. 2 Mad. 339.

(e) 1 Bom. H. C. R. 27.

the family. (a) In another case (b) the payment to a mother as manager of a debt due on a mortgage executed to her as manager was held to bind the son who by taking no steps for several years after attaining his majority might be deemed to have ratified the transaction of which he had taken the benefit. (c)

In the common case of an ancestral trade descending to the members of an undivided family, the manager can pledge the property for the ordinary purposes of the business. He may also enter into partnership with a stranger, but not enter into a compromise of partnership differences by a division and transfer of the partnership property, to the possible prejudice of minor members of the united family. (d) A managing Khot has not authority to give up important rights vested in the members generally. (e) A manager, it has been said, is not at liberty to pay out of the estate his father's debts barred by limitation. (f) His authority to acknowledge a debt does not arise necessarily from his position but may be inferred from circumstances. Thus he cannot, without special authority, revive a claim against

(a) See the cases in note (d), p. 611: *Bibi Sakhaji v. Ramset Pandushet*, 2 Bom. H. C. R. 23; *Gane Bhive et al v. Kane Bhive*, 4 *ibid.* 169 A. C. J.; *Mahabeer Persad v. Ramyad Singh et al*, 12 B. L. R. 90; and the remarks below on Bk. II. Chap. I. Sec. 1, Q. 5, *Comp. Doorga Persad's* case referred to below.

(b) *Anant Jaganath v. Atmaram*, 2nd App. 301 of 1881.

(c) See Act IX. of 1872, Sec. 197.

(d) *Johurra Bibee v. Sreegopal Misser*, I. L. R. 1 Calc. 470; *Ramlal Thakursidda v. Lakshmichund et al*, 1 Bom. H. C. R. li. Appx.

(e) *The Collector of Ratnagiri v. Vyankatray Narayan*, 8 Bom. H. C. R. 1 A. C. J. A father sued for a share of property as joint, and then entered into a *bona fide* compromise. His son subsequently renewing the claim was held bound by the transaction; *Pitam Singh v. Ujagar Singh*, I. L. R. 1 All. 651.

(f) *Gopalnarain Mozoomdar v. Muddomully Gupta*, 14 B. L. R. 49.

the family barred by limitation. (a) The Hindû law, (b) however, insists strongly on the payment of a father's debt. It is the strongest of the obligations which devolve on the sons, and the pious duty resting on them (c) may perhaps be held to justify the satisfaction in such a case of a claim that could not be enforced. In the case of *Tilakchand v. Jitmal* (d) it was ruled that a barred decree against a father is a valuable consideration for a new engagement by a son, and that a representative is not bound to plead limitation whenever he can do so. This was approved in *Bhálá Náhaná v. Parbhu Hari*, (e) where a relation of a deceased husband sought to have the act of a widow set aside, by which she fulfilled his engagement made on the adoption of a son instead of setting up limitation as a ground for repudiating it. It would seem therefore that in Bombay at any rate a manager may discharge the religious obligation of the family out of its estate without having to make the loss good at his personal cost. (f) A contract by a manager of a Hindû family with a stranger by which he seeks with the stranger's connivance improperly to obtain for himself an undue share, is rescindible at the suit of the party defrauded, and is not enforcible even as between the contracting parties. (g)

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(a) *Chimnaya Nayudu v. Gurunatham Chetti*, I. L. R. 5 Mad. 169.

(b) See Coleb. Dig. Bk. I. Chap. V. T. 185, 186; and above, Introd. to Bk. I. p. 102.

(c) See *Udaram v. Ranu*, 11 Bom. H. C. R. 76, 84.

(d) 10 Bom. H. C. R. 206, 213.

(e) I. L. R. 2 Bom. 67, 71.

(f) An executor may pay a barred debt, *Lewis v. Rumney*, L. R. 4 Eq. 451, and set off against the share of a next of kin a barred debt due by him to the estate, *Re Cordwell's Estate*, L. R. 20 Eq. C. 644. So in India the representatives of heirs claiming a share in accumulations of interest on money in Court must submit to a set-off of barred debts due by them to the estate, *Lokenath Mullick v. Odoychurn Mullick*, I. L. R. 7 Calc. 644.

(g) *Ravji Janardhan v. Gangadharbhat*, I. L. R. 4 Bom. 29.

The cases already referred to will have shown that there is much uncertainty as to the position of members of united families with respect to the property in relation to their co-members and the creditors of co-members and persons with whom the co-members have contracted obligations. It cannot, in many cases, be said with confidence whether the transactions of an alleged manager bind the whole family or not, or whether in a particular instance a member suing or sued is to be deemed a representative of all, and if not what are the precise relations to the family estate which arise through litigation at its several stages between him and strangers with or without liens or ostensible liens on the property. In the case of the transactions of a father and of suits against him as affecting his sons' interests, along with his own, in the family property, a special source of complications has been found in the doctrine by which, in recent years, the pious duty of paying a deceased father's debt not of a disreputable kind has been translated into an authority of the father to burden the estate or dispose of it for satisfaction of such a debt, and a right on the part of creditors to enforce, during the father's life, at the cost of his sons, the moral obligation which, under the Hindû law, cannot arise for them until his death. The father is usually manager. Sometimes after borrowing money for proper purposes he colludes with his sons in trying to evade the obligation by asserting that it was obtained under such circumstances that the family estate is not answerable for it. (a) The son may have acquiesced in his father's transactions. It does not seem possible to reduce the decisions of recent years on such questions as these to exact harmony ; but the questions recur so frequently that it will be useful to collect and compare the chief conclusions arrived at by the several High Courts and by the Judicial Committee. These will be considered as they bear on the ordinary co-parceners

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(a) See *Oomedrai v. Hiralal*, quoted in *Hanooman Persad's case*, 6 M. I. A. at p. 418.

*inter se*, on the manager, on the father and son, and on strangers connected with them in these several capacities in the way of litigation or of voluntary transactions.

In the recent case of *Ramsebuk v. Ramlall Koondoo* (a) at Calcutta, it seems to be intimated that when a joint family carries on trade all the members must join as plaintiffs in a suit arising out of the trade. The claim was held barred because some of the members of the family had not been joined as plaintiffs until the suit as to them was barred by Sec. 22 of Act XV. of 1877, though instituted by other members within the period of limitation. (b) In several other cases the law has been held to be expressed in the less exacting proposition that where there is no manager all the members of a united family must be joined or be effectively represented in a suit brought to affect the common property; (c) but where there is a manager acting honestly, or where there has been an effectual representation, all may be bound, though not individually made parties. (d) In one case infants were held liable for a share though the manager had had no right to defend the suit in their name (e).

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(a) I. L. R. 6 Calc. at p. 826. Followed in Bombay in *Kalidas v. Chotalal*, H. C. P. J. 1883, p. 31. Comp. 2 Str. H. L. 331 ss.

(b) See further below, IV. LIABILITIES ON INHERITANCE. Compare the case of *Goodtitle dem. King v. Woodward*, 3 B. and Ald. 689.

(c) See *Rājārām v. Luckman*, *supra*; *Norender Narayan v. Dwarka Lal*, L. R. 5 I. A. 18, 27; *Reasut Hossein v. Chorwar Singh*, I. L. R. 7 Calc. 470; see *Radha Proshad Wasti v. Esuf*, *ib.* 414; *Akoji and Gopal v. Hirachand*, Bom. H. C. P. J. 1882, p. 320.

(d) Coleb. Dig. Bk. II. Chap. IV. T. 54; *Jogendro Deb Roy v. Fmndro Deb Roy*, 14 M. I. A. at p. 376; *Mayārām Sevrām v. Jayantirav Pandurang*, Bom. H. C. P. J. F. for 1874, p. 41; *Nārāyan Gop Habbu v. Pándurang Ganu*, I. L. R. 5 Bom. 685; *Bissessur Lall Sahoo v. Maharajah Luchmessur Singh*, L. R. 6 I. A. 236; *Radha Kishen Man v. Bachhaman*, I. L. R. 3 All. 118. See below, SEPARATION.

(e) *Doorga Persad v. Kesho Persad*, L. R. 9 I. A. 27.

Of this class of suits it had previously been said by the Judicial Committee (a) that when the members have not conflicting interests there are cases "wherein the interest of a joint and undivided family being in issue, one member of that family has prosecuted a suit or has defended a suit, and a decree has been made in that suit which may afterwards be considered as binding upon all the members of the family, their interest being taken to have been sufficiently represented by the party in the original suit." It was held in *Mayaram Sevaram v. Jayvantrav Pandurang*, (b) that a son had been sufficiently represented by his father in a suit on a mortgage. A father having sued for a share of property as joint and then entered into a *bonâ fide* compromise, his son subsequently renewing the claim was held bound by the transaction, (c) and more recently that nephews had been represented by their uncle. (d) Similarly in *Bissessur Lall Sahoo v. Maharajah Lachmessur Singh* (e) it was held that decrees which "are substantially decrees in respect of a joint debt of the family and against the representative of the family," "may be properly executed against the joint family property." (f) At Allahabad it has been held that where the family property hypothecated by a father for family purposes had been sold in execution of a decree against him alone the sons could not recover their shares from the purchaser. (g) The learned Judges say that the decision of the Privy Council is an authority for holding that when a suit is brought to recover a family debt against a member of a joint Hindû family it may be assumed that

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(a) *Jogendro Deb Roy Kut v. Funindro Deb Roy Kut*, 14 M. I. A. p. 376.

(b) S. A. No. 435 of 1873; Bom. H. C. P. J. F. for 1874, p. 41.

(c) *Pitam Singh v. Ujagar Singh*, I. L. R. 1 All. 651. (It is not said whether at the time of the earlier suit the son was a minor.)

(d) *Nârāyan Gop Habbu v. Pandurang Gannu*, I. L. R. 5 Bom. 685.

(e) L. R. 6 I. A. 233, 237.

(f) See above pp. 168, 169, and *Umbica Prosad Teewary v. Ram Sahay Lall*, I. L. R. 8 Calc. 898.

(g) *Ram Narain Lal v. Bhavani Prasad*, I. L. R. 3 All. 443.

the defendant is sued as a representative of the family, (a) and also for holding "that.....decrees.....substantially.....in respect of a joint debt.....may be properly executed against the family property." In a subsequent case (b) it has been held that adult members presumed to know of a mortgage by a father for family purposes and not protesting, (c) and not afterwards asking to be made parties to a suit on the mortgage against the father alone, are bound by the decree (d).

This seems to put the liability of sons arising from transactions of their father and from suits against him on the ground of representation through their acquiescence. (e) The same doctrine has been applied in Bombay where there had been a conscious and willing participation in benefits obtained. (f) Thus the payment to a mother as manager of a debt due on a mortgage executed to her as manager was held to bind the son, who by taking no step for several years after attaining his majority might be deemed to have ratified the transaction of which he had taken the benefit, (g) but the presumption has not been carried to the length in any ordinary case of excusing one who would impose a liability

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(a) This doctrine was rejected at Calcutta in *Ramphul Singh v. Deg Narain Singh*, I. L. R. 8 Calc. at p. 523. As to a suit against a father's instead of a son's widow, see *Siva Bhagiam v. Palani Padiachi*, I. L. R. 4 Mad. 401.

(b) *Phul Chand v. Man Singh*, I. L. R. 4 All. 309.

(c) In *Upooroop Tewary v. Lalla Bundhjee Sahay*, I. L. R. 6 Calc. 749, the son wilfully stood by allowing the creditor to suppose he assented. See I. L. R. 8 Calc. at p. 524.

(d) This obligation in the case of a mortgage is denied at Madras. See below.

(e) In *Phul Chand v. Luchmi Chand*, I. L. R. 4 All. 486, the father as manager of a family firm was sued for business debts. Family property was sold in execution of the decree, and his infant son was held bound on account of the capacity in which his father had been sued. For Bombay see *Ramlál's case*, 1 Bom. H. C. R. App. pp. 52, 72.

(f) *Anant Jagannátha v. Atmáram*, S. A. 301 of 1881.

(g) See Act IX. of 1872, Sec. 197.



on a member of a family from making him a party to the transaction or the suit. Even at Allahabad it was formerly held that the mere sale of the rights and interests of one as father of a joint Hindû family does not include the shares of his sons even though he could dispose of those shares. (a) A suit against the father alone on a mortgage by him as manager was thought to bind the family, but a sale in execution of his interest not to bind the shares of the sons. (b) In *Chamaili Kuar v. Ram Prasâd*, (c) it was held that good faith in the purchaser did not validate his purchase from a father who sold for an immoral purpose during his son's minority. The principle was adhered to that one co-sharer could not dispose of the joint estate or any part of it, and that the father could not as manager sell the estate merely for his own self-indulgence, of which information was accessible to the purchaser. Similarly at Calcutta it was said that a son could not ordinarily be affected by a suit against the father alone. But on the ground that he had acquiesced for several years in the mortgagee's possession he was not allowed to recover his share sold in execution to the mortgagee. (d)

In the same case it is said that a father can dispose of the whole ancestral estate, or at least that it is the duty of the son to pay all his father's debts out of the estate equally during the father's life as after his death. The liability thus stated stands quite apart from acquiescence and rests on a transfer to the time of the father's life of a duty to pay his debts which the Hindû authorities expressly impose only after his death.

These and many other cases are considered in the judgment of Field, J., in *Ramphul v. Deg Narain Singh*, (e)

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(a) *Nanhak Joti v. Jaimangal Chaubey*, I. L. R. 3 All. 294.

(b) *Deva Singh v. Ram Manohar*, I. L. R. 2 All. 746; *Bika Singh v. Lachman Singh*, *ib.* 800. See also *Chandra Sen v. Ganga Ram*, *ib.* 899.

(c) I. L. R. 2 All. 267.

(d) *Laljee Suhoy v. Fakeer Chand*, I. L. R. 6 Calc. 135, 139.

(e) I. L. R. 8 Calc. 517.

and the conclusions he arrives at are that a "father may alienate the family property to discharge debts incurred by him for purposes not illegal or immoral," but that where the father has not "aliened or mortgaged the family property, but it is sought by suit to make that property liable to satisfy a debt incurred by the father, the son as well as the father must be made a party to the suit," failing which the consequent sale of the father's interest does not affect that of the son. *Girdhari Lal's* case is explained as one in which the father, acting as manager, mortgaged the family estate, and the debt not being an immoral one (a) the interest of the son as well as the father was bound by the transaction. The question of whether the son could be bound by a decree in a suit to which he was not a party "was not raised ..... and therefore nothing was decided on this point." In *Deen Dayal's* case it is pointed out the question was raised, and the father's interest only having been sold the issue of legal necessity for the original debt was pronounced immaterial.

*Badri Roy v. Bhagwat Narain Dobey* (b) seems to agree with the one just referred to. In it a son, a widow and a grandmother of a defendant were allowed to recover their shares (c) from a judgment creditor who had purchased in execution of a money decree. But the purchaser having taken an assignment of a prior decree on a mortgage against the same defendant they were held bound by that liability, they not having shown that the debt was contracted for

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(a) As manager the father was bound to act in the interest of the family, and any stranger dealing with him was bound to establish a fairly reasonable belief that this duty was observed as a condition of enforcing his transaction against the family. The question of immorality could, under the Hindû law, arise for the son only when it was a question of paying the debt of a father deceased or long absent. See below.

(b) I. L. R. 8 Calc. 649.

(c) As to the "shares" of the widow and grandmother, see above, p. 310, 338; and below, Sec. 7 A. 1 a, 1 b.

immoral purposes. The voluntary incumbrance and the decree obtained on it availed against the son, but not the sale in execution. (a) In *Upooroop Tewary v. Lalla Bundhjee Sahay* (b) on the other hand, it is laid down that though the moral duty resting on the son gives effect to a father's alienation of the estate as against the son and his share while the son is an infant, yet when the son is an adult the father cannot, even to pay off his debts, dispose of the son's share without his consent. The assent might, it was thought, be implied from quiescence coupled with knowledge of the father's dealing. (c) In *Umbica Prosad Tewary v. Ram Sahay Lall* (d) it is said that by a decree against a father alone if he have been sued as representing the family his son's interests are generally bound. It does not seem to have been thought that the father need be sued specifically as representative, though without such specification the sons could not know for certain that their property was aimed at. The case of *Suraj Bunsee Koor* (e) is relied on, but that decision saves the purchaser only if "the property was property liable to satisfy the decree if the decree had been properly

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(a) The Madras doctrine is the reverse of this, *see* below.

(b) I. L. R. 6 Calc. at p. 753. *See* next note.

(c) It may be noted that the Mitāksharā and other authorities do not, even after the father's death, impose the duty of paying his debts on his son until the son attains his majority. *See* below, and 2 Str. H. L. 279. A managing member and those dealing with him are bound to have regard to the interests of infant coparceners, *Saravana Tevan v. Muttayi Ammal*, 6 M. H. C. R. at p. 379.

The provisions of the Hindū law exempting an infant while such from responsibility for ancestral debts, and limiting liability on account of a grandfather's debts to the amount of the principal, may be compared with the 10th Article of Magna Charta. By this interest is not to run during the minority of the successor, and the king himself is to obtain satisfaction only out of the moveables specifically charged. *See* Bracton, fol. 61 a.

(d) I. L. R. 8 Calc. 898.

(e) L. R. 6 I. A. 88.

given against the father." This of course involves the question in every case of what property under the circumstances was liable under a decree against the father alone, and generally of how far without specification he can be held to have represented his sons and co-owners of the estate.

The effect of the judgment in *Girdhārīlāl v. Kantoo Lall* on which all these judgments rest, must, as in other cases, be gathered from the language of the Judicial Committee in relation to the facts as they understood them. There was an ancestral estate alienated after the birth of a son to satisfy a decree against his father. The son sued on the ground that no part of the joint estate was alienable by the father. The creditor maintained that the whole had passed to him; and this view was taken by the Judicial Committee. In *Maddan Thakur's* case a particular part of the estate had been sold in execution of a decree against the father, and here too the son's claim was rejected. In these instances the divisible nature of the patrimony as a means of giving effect to the father's transactions was not asserted on either side, (a) but in *Deen Dayal's* case which followed, this divisibility of interests was made the basis of the decision. (b) The claim was one for which the son's share would undoubtedly have been liable had the son been made a defendant; but as the father only was sued, the nature of the obligation, as in itself binding or not binding the son, was pronounced immaterial. Only the father's own share, it was said, could thus be made answerable to the creditor. There may have been a possible question as between the father and other co-sharers, but this could not affect the relations of the father and the son *inter se*, and the son's rights only were insisted and adjudicated on. It would

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(a) A dictum in *Syed Tuffuzool Hoosein Khan v. Rughoonath Persad*, 14 M. I. A. at p. 50, pronounces an undivided share liable for a decree, but "not property the subject of seizure (by attachment) but rather by process direct against the owner of it."

(b) So in *Rai Narain Dass v. Nounit Lall*, I. L. R. 4 Calc. 809.

seem therefore that, at any rate where there is no specification of a representative character ascribed to the father, a suit and a decree against him alone and a sale in execution of such a decree cannot generally be understood as binding the son's share except under special circumstances to be appreciated by the Court.

In *Suraj Bunsee Kooer's* case (a) the effect of *Girdhari's* case is stated on the highest authority as this: "It treats the obligation of a son to pay his father's debts unless contracted for an immoral purpose, as affording of itself a sufficient answer to a suit brought by a son, either to impeach sales by private contract for the purpose of raising money in order to satisfy pre-existing debts, or to recover property sold in execution of decrees of Court." The same judgment imposes on a purchaser in execution, as a condition of security against a son's claim, the obligation of seeing that the property sold in execution "was property liable to satisfy the decree if the decree had been given properly against the father," and the conclusion is (b): 1st, That where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and 2ndly, That the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings. It will be observed that this judgment assumes that in some way the joint property does pass out of the family by the father's

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(a) L. R. 6 I. A. 88, 105.

(b) L. R. 6 I. A. at p. 106.

conveyance, or by a sale in execution on a decree against him. This must mean "*primâ facie*," for otherwise there could be no ground for a reclamation of the property by the son, which was successfully made in the case, on the ground that the debt had been improperly incurred, and that the purchaser in execution had notice of the objection to the sale taken on that account. As to whether in a case in which the property has not been sold the son can be made answerable in his share for the father's debt needlessly but not viciously incurred, this judgment is silent. But where the whole estate is made liable by the father's alienation, or a decree against him, no purpose could be served by maintaining a law exempting the son and his share in the estate from direct proceedings. In these therefore as well as in suing to recover his part of the patrimony sold as his father's he must for consistency's sake now be called on to prove that the transaction sued on was an immoral one, or gave effect to an immoral one, within the knowledge of the plaintiff suing on it. Should the son however not be joined as a defendant with his father it must be observed that in *Deen Dayal's* case the property had "passed out of the family" equally as in *Girdhari's* case, and it was on the finding liable for the debt ; but still the judgment in the case says that "whatever may have been the nature of the debt the appellant cannot be taken to have acquired by the execution sale more than the right, title, and interest of the judgment debtor."

In *Suraj Bunsee Kooer v. Sheo Prasad Singh* (a) it is said on this point that "it has been ruled that the purchaser of undivided property at an execution sale *during the life of the debtor* for his separate debt does acquire his share in such property with the power of ascertaining and realizing it by a partition." Probably what was meant was that *even* in the case of a separate debt the sale under a decree was good as against the judgment-debtor's own share, and such was the effect of

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(a) L. R. 6 I. A. 88, 103.

the decision on *S. Bunsee Koor's* appeal. The other question of the father's transactions binding the son as to the son's share in the patrimony in all cases in which he cannot prove the transactions tainted with immorality, of which the purchaser had notice, was left to be governed still by *Girdhari's* case, subject only where a father had been sued alone, and not expressly as a representative, to the ruling in *Deen Dayal v. Jagdeep Narayan*. In the former of these cases it was said "The suit was brought by Kantoo Lall and Mahabeer, not for the purpose of recovering their respective shares, because they had no distinct or definite shares to recover, but to recover the whole property on the ground that the sale by the father was void." (a) It was supposed they must recover all or none. The incapacity of a co-sharer to deal alone with his share was down to *Deen Dayal's* case a received doctrine in Bengal, (b) and the creditor's remedy could be based only on the doctrine of a complete representation of the family as to its patrimony by the father. *Deen Dayal's* case broke down this conception by its incompatibility, and the essentially integral character of the patrimony on which both parties relied in *Girdhari's* case being abolished, the father's share could be attacked alone, and being open to attack alone was, subsequently to *Deen Dayal's* case, to be held as attacked alone unless other shares were specified, and their owners made parties defendant. If the father could be sued as their representative, it should at least be set forth that he was sued in that character as well as in his own person, (c) in order to bind other interests than his own separable share.

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(a) L. R. 1 I. A. at p. 329.

(b) See *Musst. Phoolbas Koonwur v. Lalla Jogeshur Sahoy*, L. R. 3 I. A. at pp. 22, 26; *Raja Ram Narain Singh v. Pertum Singh*, 11 B. L. R. at p. 401.

(c) How a son may be ruined by his father's mere improvidence or imbecility when he has not the opportunity of guarding his own interest, may be seen in *Luchmi Dai Koori v. Asman Singh*, I. L. R. 2 Calc. 213.

In Madras the same questions have recently been learnedly and elaborately discussed. (a) The result is concisely stated by Kindersley, J: "The true doctrine of Hindû law appears to be that the obligation of the son to pay his father's debts does not arise until the father's death. It is the duty of the father, as long as he lives, to pay his own separate debts. But the cases of *Girdhari Lall* and *Muddun Thakoor* go further and rule that even in the undivided father's lifetime, where there has been a decree against the father for debts which were neither immoral nor illegal, and ancestral immoveable property has been sold in execution of such decree or under pressure of such execution, the son cannot recover against a *bonâ fide* purchaser for value. The cases of *Girdhari Lall* and *Muddun Thakoor* appear to imply that a son is responsible for his father's debts even in the lifetime of the father." It is only necessary to add to this that satisfaction of this responsibility is thus far limited to the share of the son in the patrimony, and does not extend to his other property. (b) In the Court of First Instance the ruling in *Deen Dayal v. Jagdeep Narayan* had been applied to the case, as the decree and execution had been obtained against the father alone. (c) Of this there is hardly any discussion in the judgments, but seeing that it introduced a modification of the law of actions as conceived in *Girdhari's* case it was important that effect should be given to it, especially since in Madras, as in Bombay, the creditor's equity to enforce partition having long been recognized, (d) a suit against a father alone might most

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(a) *Ponâppa Pillai v. Pappuvayangûr*, I. L. R. 4 Mad. 1-73.

(b) The *Mitâksharâ* is emphatic in declaring that the son's responsibility, where it exists, arises from sonship, though no property may have come to the son, Comm. on Slokas 47 and 50 of the *Vyavahâradhyâya* of *Yâjñavalkya* (translated in the Appendix to this work). So the *Vyav. May. Chap. V. Sec. 4, para. 14.*

(c) See however *Sivasankara Mudali v. Parvati Anni*, I. L. R. 4 Mad. 96. *Girdhari Lall's* case is said not to apply to a nephew coparcener; necessity must be proved, *Gangulu v. Ancha Bapulu*, *ib.* p. 73.

(d) *Suraj Bunssee's case*, L. R. 6 I. A. at p. 102.



reasonably have been held to have had this remedy in view. As observed by Kernan, J., (a) "there can be no doubt that a person not a party to a suit is not bound by the decree by way of estoppel, and it is open to him to impeach the title of the purchaser on any ground legally sufficient." It may be added that one person or his property cannot be affected by proceedings against another not his representative and whose interest is distinguishable. (b) This was the decision as between a living father and son in *Deen Dayal's* case, and it seems to have afforded a "ground legally sufficient" in *Ponappa's* case for impeaching a sale under proceedings in which the son or the son's interest was not named. Such seems too to be the effect of the still more recent decision in the *Subramaniyayanas'* case on a suit upon a mortgage executed by an elder (managing) brother in renewal of one by the deceased father, and a decree and sale in execution against that brother alone of the family property. (c)

One curious result of the Madras decisions seems to be that the creditor who takes from the father a mortgage as security for his claim puts himself in a worse position than one who relies on the simple obligation. The latter by suing the father alone may bind the whole family and its estate, while the former must join all the sons as defendants in order to

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(a) *Ponappa Pillai v. Pappuvayangar*, I. L. R. 4 Mad. at p. 71.

(b) Thus in *Ponappa's* case it was said that in a suit on the mortgage the coparceners could not be bound unless made parties so as to give them an opportunity of redeeming. See *Chockalinga v. Subbaraya*, I. L. R. 5 Mad. at p. 135, wherein it was ruled that a decree on a hypothecation against a father could not operate against his sons not made defendants; and *Dasaradhi v. Joddumoni*, *ib.* 193, where redemption was allowed against a sale under a decree on a mortgage against a manager.

(c) *Subramaniyayan v. Subramaniyayan*, I. L. R. 5 Mad. 125, by three judges against two, who would have allowed the younger brother to recover his share only on paying his share of the mortgage debt.

foreclose their rights by his suit on the mortgage. Yet it is not altogether obvious if a suit directed against the father alone can bind the sons as co-owners why a suit against him as mortgagor (and owner) should not bind the sons as co-mortgagors; the power of representation by the father would seem as consistent with principle in the one case as in the other. What would be the legal position of the sons where the mortgagee had sold under a power of sale in a mortgage by their father without calling on the sons to redeem is a point still to be decided. There is apparently no distinction in principle between such a sale and a sale under a decree in a suit on the mortgage. In every case of mortgage there is a personal obligation of the mortgagor (a) as a debtor, the mortgage being in its nature an accessory assurance; (b) and it would seem as competent to a father to sell through the agency of the mortgagee on a condition satisfied as to sell directly for the discharge of a similar debt, (c) which he may do in ordinary cases. But on the other hand if the son's interests cannot be sold through the Court without an opportunity to the sons of redeeming, neither ought they to be sold without a suit or formal notice to redeem served on the sons equally as on the father. Where under a decree against a father on a debt secured by a mortgage the mortgaged family estate had been sold "as the right, title, and interest" of the father, and there was nothing to show whether the execution was in virtue of the personal remedy or of the lien on the property, the sale was upheld against the sons seeking a partition with a view to recover their shares. The learned judges thought, apparently,

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(a) *Wilson v. Tooker*, 5 Br. Parl. cases, 193; *Goodman v. Grierson*, 2 B. & B. 274, 279; Com. Dig. Tr. Chancery (4 A. 3).

(b) See Butler's note to Co. Litt. 235 a; Fisher on Mortg. lxxii, and per Lindley, J., in *Keith v. Burrows*, L. R. 1 C. P. D. at p. 731.

(c) See per Sir C. Turner, C. J., in *Ponáppa Pillai v. Pappuvayangár*, I. L. R. 4 Mad. 47. According to the Sadr Court the father could not alien the patrimony except under urgent necessity, *Muthumarien v. Lakshmi*, M. S. D. A. Dec. for 1860, p. 227.

that the sale had taken place to satisfy the personal obligation so far as this was in excess of what could properly be satisfied by the execution against the mortgaged property as such, (a) and that thus the sons' interests as distinguished from the father's were effectually disposed of as his, though in a sale expressly under the mortgage they would have been saved. (b) In a case in which the paternal and filial relation did not subsist as a ground for a special liability, the family property having been mortgaged by one member of an undivided family and sold, in execution of a decree against that one alone, to the judgment creditor, it was held that the latter had obtained a title only to the share of his own judgment debtor; that another member could recover his share from the purchaser put into possession of the whole; and that the purchaser could not set up the defence that the debt sued on was in fact one by which all the members were bound. (c) In another recent case it was ruled that the interest of a manager in a family estate was not assets for the satisfaction, after his death, of a decree obtained against him, but not plainly directed against other members of the united family. In the same case two sons were directed to satisfy the decree so far as it bore on their father to the extent of the assets inherited from him. But in these were not to be included his share of the joint family estate which they took by survivorship. (d) This view, though repeated in *Karpakambál v. Subbayyan*, (e) seems opposed to that expressed by the Judicial Committee in *Muttayan Chettiar's*

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(a) An attachment and sale as for an unsecured debt are not necessary in giving effect to the specific lien created by a mortgage. *Dayachand v. Hemchand*, I. L. R. 4 Bom. 515.

(b) *Srinivása Nayudu v. Yelaya Nayudu*, I. L. R. 5 Mad. 251.

(c) *Armugam Pillai v. Sabápathi Padiáchi*, I. L. R. 5 Mad. 12. This agrees with *Deen Dayal's* case, but, if the family were bound by the debt, seems hard to reconcile with *Ponáppa Pillai v. Pappuvayangár*, I. L. R. 4 Mad. 1. See above, p. 169.

(d) *Ravi Varma v. Y. Koman*, I. L. R. 5 Mad. 223.

(e) I. L. R. 5 Mad. 234.

case, (a) which for Madras must be conclusive. In the case of a decree against a father sought to be executed against property made over by him to his infant sons as compensation for an injury by him to their shares (b) it was held that such execution could not be had because the infant coparceners had not been parties to the suit, and that a suit could not be maintained against them (their father being alive) on the original cause of action, as this had been exhausted by the suit against the father. (c)

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(a) Above, p. 169; L. R. 9 I. A. at p. 145.

(b) This may have made it separate property; the sons indeed could not otherwise benefit by the release in their favour of the father's interest.

(c) See *Gurusami Chetti v. Samurti Chinna Chetti*, I. L. R. 5 Mad. 37. For this Innes, J., refers to *King v. Hoare*, 13 Mees. & W. 494; *Brinsmead v. Harrison*, L. R. 7 C. P. 547, and *Hemendro Coomar Mullick v. Rajendro Lall Moonshes*, I. L. R. 3 Calc. 353, as showing that a joint contract can be enforced but once, whence *a fortiori* the same rule applies to proceedings on an obligation arising from the relation of membership of a joint family.

In the case of *ex parte Higgins in re Tyler*, 27 L. J. Bank. 27, a remedy in bankruptcy against the joint estate was held barred by a previous suit against one of two partners which proved infructuous. But in that case Knight Bruce, L. J., said, "I feel myself almost ashamed to find myself differing from the Commissioner" (who had admitted the claim against the joint estate). In Comyns's Dig. (K. 4;) 1, 4 and (L. 9) the distinction is drawn that where damages are uncertain only one action can be maintained, but where the thing sought is certain even execution does not bar a suit against another obligor, *ex. gr.* on a bond. In *Drake v. Mitchell*, 3 Ea. at p. 258, Lord Ellenborough says that a judgment is but a security for the original cause of action and does not extinguish before satisfaction any collateral remedy available to the party. *Brinsmead v. Harrison* is discussed in *ex parte Drake*, L. R. 5 Ch. D. 866, from which it will be seen that an infructuous judgment does not extinguish the original right in a case of trover or detinue. Although therefore generally "where there is *res judicata* the original cause of action is gone" (per Lord Selborne in *Lockyer v. Ferryman*, L. R. 2 App. C. 519), and election to sue B. bars a suit against C (see *Kendall v. Hamilton*, L. R. 3 C. P. D. 403), yet the primary right may not in all cases be converted or absorbed by a suit. Nor where the cause of action arising from non-fulfilment

In Bombay a somewhat different view of the law has been taken, and it may be that by a closer adherence to the Hindû authorities greater consistency has been maintained. In all ordinary cases alienation of the whole estate or of part of an impartible estate by a single co-sharer has been held

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of the corresponding duty is one which attaches in aliquot parts to several persons or as an aggregate to any one of several, but not to more than one does it seem that on principle one suit though infructuous should bar another seeking the same remedy in part or as a whole. The English law on this point merging a remedy against C in a judgment against B, rather imitates the earlier and ruder Roman law than its later and refined form. A "cause of action" is really a relation between persons, and the substitution of a different person as the subject of the right or of the obligation, makes the cause of action different too, unless the new party stands to the former one as a representative. As a representative he should be subject to the proceedings taken against his predecessor. Thus children, if represented by their father, should be liable on a decree against him; if not, they should not be guarded against a suit on what must be a different cause of action because of the change of parties.

The Roman law, while it allowed the plea of *res judicata*, allowed also the replication *de re secundum se judicata*, or judgment against the party pleading, even between the same litigants (Di. Lib. 44, Ti. II. Lex. 9 § 1, and Voet's Comm. *ad loc*), and under the English law it seems that a judgment as between the same parties is not a bar to a fresh suit unless it has negatived the right sued on (*see* Com. Dig. C. L. 4) even though there may have been a verdict against the plaintiff (*see* per Bramwell, L. J., in *Poyser v. Minors*, L. R. 7 Q. B. D. at p. 338). And under the Hindû law the rule is "one against whom a judgment had formerly been given if he bring forward the matter again, must be answered by a plea of former judgment." (Mit. Administration of Justice, Sec. 5, para. 10). This is exactly the rule of the middle and later Roman law, and does not help a defendant against a plaintiff who has gained a previous judgment. The law of procedure forbids a second suit on the same cause by a positive rule in order to shorten litigation, and it enables a judgment once obtained to be kept alive for 12 years, but these provisions between the same parties are rather a supersession of the general principle of jurisprudence, and cannot properly affect a suit by A. against C. on the ground of a prior suit by A. against B, except in so far as C. represents B, or else the remedy was alternative, and A. made an election by which C. was exonerated.

invalid as against the others. (a) This has been so even as regards a father. (b) His grant out of an inam village was held to require the attestation of his son to give it validity as against him, (c) the attestation being taken as a sign of assent. Where a man sought to alienate the patrimony this was defeated as to a moiety at the suit of his son. (d) Though the interests of sons in the family estate are liable to satisfy a father's debt, (e) yet if the father's interest has not been attached under a decree against him in his lifetime, the property passes on his death to his sons by survivorship, and the decree-holder can no longer execute his decree against the property. He must have recourse to a separate suit. (f) In the case of ordinary coparceners, alienations by them, or sale of their interests in execution of decrees, have been held good to entitle the purchaser to claim to the extent of their shares ascertained by partition, but no farther. (g) In this sense the purchaser becomes a tenant

(a) Mit. Chap. I. Sec. 1, para. 30. Comp. *Mohabeer Pushak v. Ramyad Singh*, 20 C. W. R. at p. 194.

(b) Mit. Chap. I. Sec. 1, para. 28. Comp. *Raja Ram Narain v. Pertur Singh*, 20 C. W. R. 189.

(c) *Pandurang v. Naru*, Sel. Rep. 186; see Steele, L. C. 68, 237, 400.

(d) *Dayashankar v. Brijvallubh Moteechund*, Bom. Sel. Rep. 41. So *Gopalchand Pande v. Babu Kunwar Singh*, 5 C. S. D. A. R. 24; *Moteelal v. Mitterjeet Singh*, 6 C. S. D. A. R. 71; *Mukoon Misr v. Kunyah Ojah*, 1 N. W. P. R. 275; *Rungamma v. Atchamma*, 4 M. I. A. 1.

(e) In Bombay the interests while still in their hands : there is not a charge in the strict sense as in the case of a specific lien. See *Jamiyatram v. Parbhudas*, 9 Bom. H. C. R. 116, and below, "LIABILITIES ON INHERITANCE," and compare the case of *Benham v. Keane*, 31 L. J., Ch. 129.

(f) *Hanumantha v. Hanumayya*, I. L. R. 5 Mad. 232, citing *Udaram v. Ranu Panduji*, 11 Bom. H. C. R. 76; and *Narsinbhat Bapubhat v. Chenappa*, I. L. R. 2 Bom. 479.

(g) *Gundo v. Rambhat*, 1 Bom. H. C. R. 39; *Pandurang v. Bhasker*, 11 Bom. H. C. R. 72; *Udaram v. Ranu*, ib. 76; *Balaji Anant v. Ganesh Janardhan*, I. L. R. 5 Bom. 499.

in common with the other parceners. (a) For the ordinary debts of a parcener his coparceners are not answerable. (b) His own share may be made answerable by proceedings taken and carried through to attachment during his life but not afterwards. (c) His gift or bequest of his share is invalid as the right to a severance of it is given to the purchaser or creditor only to prevent fraud. (d) In case of distress or to perform an indispensable duty a single coparcener may dispose of so much of the family property as is necessary for the occasion. (e) His debts incurred for such a purpose must be paid by all the parceners to the extent of the whole estate. (f) This applies even to the debt of a son as binding the father, though the latter is not generally responsible. (g) If the parcener be merely sued the coparceners are not affected by that, without a decree and an attachment of the estate for the realization of his share. (h) But this attachment enables the attaching creditor to proceed even though his debtor should die. (i) Nor can a purchaser of a share be defeated by subsequent proceedings for a partition to which he is not a party. (j)

(a) *Udaram v. Ranu*, 11 Bom. H. C. R. p. 81; *Krishnaji Rájvádé v. Sitarám Jakhi*, I. L. R. 5 Bom. 496.

(b) *Narsinhbhat v. Chenappa*, I. L. R. 2 Bom. 479; St. L. C. 40, 217.

(c) *Udaram v. Ranu*, 11 Bom. H. C. R. p. 85; see above, pp. 606, 607.

(d) *Ib.* p. 80, and the cases there cited; *Suraj Bunsee Koer's case*, above, p. 625.

(e) Mit. Chap. I. Sec. 1, para. 28; Steele, L. C. 54.

(f) *Mahadev v. Narain Mahadev*, 3 Morr. 346; Vyav. May. Chap. V. Sec. 5, para. 20; Coleb. Dig. Bk. V. Chap. VI. T. 373, Comm. ad. fin.; Bk. I. Chap. V. T. 181, 193, 194; Bk. II. Chap. IV. T. 55; Poona Śāstri, 17th Aug. 1845, MS. 685; see 1 Str. H. L. 276; Steele, L. C. 219.

(g) Coleb. Dig. Bk. I. T. 214, 215; Steele, L. C. 40, 178.

(h) *Vásudev Bhat v. Venkatesh Sanbháv*, 10 Bom. H. C. R. 139, 160.

(i) See *Suraj Bunsee Koer's case*, *supra*; *B. Krishna Rao v. Lakshmana Shanbhogue*, I. L. R. 4 Mad. 306.

(j) *Apaji Govind v. Naro Vital Gháte*, H. C. P. J. F. for 1882, p. 335.

Where the purchaser of a single coparcener's share has obtained peaceable possession, the Court treating him as a tenant in common has refused to oust him at the suit of the other coparceners. (a) Being in possession the single parcener has been supposed to be able to transfer the possession, where the transfer was not resisted, with such an accompanying right as was vested in himself. (b) This doctrine involves a certain difficulty, seeing that the existence of any distinct right in the individual coparcener, except a right to partition and its result, admits of question; and the occupation of a distinct part of the common property by one coparcener may be conceived as merely permitted by the family, and as to outsiders held on behalf of the family, not of the individual. (c) Such an occupation is to be regarded perhaps rather as a use of the property, occupied in virtue of the occupier's domestic relation to the aggregate family, than a true possession (d) implying an exclusion of others'

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(a) *Mahábaláyá v. Timáyá*, 12 Bom. H. C. R. 138; *Kállappa v. Venkatesh*, I. L. R. 2 Bom. 676.

(b) *Mahábaláyá v. Timáyá*, 12 Bom. H. C. R. at p. 140.

(c) That the possession of a single parcener is *prima facie* a derivative one ranking as the possession of all, see *Yusef Ali Khan v. Chubbee Singh*, 5 N. W. P. R. 122; *Sheo Pershad Singh v. Leelah Singh*, 20 C. W. R. 160; *Heeralal Roy v. Bidyadhur Roy*, 21 C. W. R. 343. Yet it was said that possession could not be recovered from a member excluding his co-sharers, *Govind Chunder Ghose v. Ram Coomar Dey*, 24 C. W. R. 393. It would seem that they were entitled to co-possession. A distinct exclusion of a co-sharer is incompatible of course with his retaining co-possession, and limitation begins to run against him in favour of those who then hold adversely to him, *Jowala Buksh v. Dharum Singh*, 10 M. I. A. at p. 535. A parcener retaining exclusive possession of a part for several years would thus expose himself to a presumption that a partition had been made allotting that part as his share to him, unless he could show his concurrent joint enjoyment of the estate at large. See below, Sec. 4 D., and Bk. II. Chap. IV.

(d) See Savigny, Poss. Secs. 11, 23, 25; Vin. Abr. XVI. 454; Co. Lit. 277a; *Page v. Selfy*, Bull's N. P. 102b; *Doe v. Brightwen*, 10 Ea. 533; *Heeralal Roy v. Bidyadhur Roy*, 21 C. W. R. 343 C. R.



entrance and exercise of will within the given area. (a) The notion of a separable possession corresponds however to that of the single coparcener's total right as separable in thought and in law, though undivided, from the others so as to be a possible object of transactions, for if the co-ownership may be thus decomposed, so it seems may the co-possession of the members of a united family. (b) At this point the development of the idea of separable rights as combined by addition in the common right has stopped. A case in which a mortgagee of one parcener's share was put into joint possession with another parcener resisting the intrusion has not (c) been followed.

In the case of a manager he can bind the whole estate by transactions for its benefit (d) or which the other party reasonably thinks so. He is allowed a fair latitude of discretion. (e) In *Davlatrao v. Narayanrao* (f) it was said "a reasonable degree of latitude is allowed to the members of a Hindû family in the absence of.....fraud or.....profligacy, and the expenditure of a managing member whose acts (g) are not protested against, or checked by legal proceedings, is ordinarily presumed to be on account of the family, just as his acquisitions are made for its benefit." (h) The extent

(a) A separate possession on behalf of himself alone, not on behalf of all, should apparently involve a liability to account, which is not recognized. See *Konerrav v. Gurrao*, I. L. R. 5 Bom. 589.

(b) Compare the right arising in partition from separate occupation, below, Sec. 7 A. 1 b.

(c) See *Bâlâji Anant Râjâdiksha v. Ganesh Janârdhan Kâmati*, I. L. R. 5 Bom. 499, and the cases there referred to; also *Mâruti v. Lilâchand*, I. L. R. 6 Bom. 564, and other cases quoted below.

(d) *Bulakhidas v. Ghama*, Bom. H. C. P. J. 1880, p. 224; *Comp. Kombi v. Lakshmi*, I. L. R. 5 Mad. at p. 207.

(e) *Babaji v. Krishnaji*, I. L. R. 2 Bom. 666.

(f) H. C. P. J. F. for 1877, p. 175.

(g) i.e. his known acts.

(h) *Comp. Tandavaraya Mudali v. Valli Ammal*, 1 Mad. H. C. R. 398, and *Hanooman Persad Pande's case*, 6 M. I. A. 393, as to the manager of a minor's estate.

of his general powers is well known in Hindû society. He may carry on a family business in the usual way (a) for the common benefit. (b) He may mortgage the common property for the common benefit and use of the undivided family. (c) But he is far from having unfettered power. (d) The person to whom he mortgages, and especially to whom he sells (e) any part of the patrimony is bound to all reasonable care, and where the interests of minors are concerned to extreme caution. (f) But even where the other coparceners are adults, charges incurred by a manager are binding except as against himself only when incurred for the needs of the family or with the assent, express or implied, of its members. (g) When the manager obviously exceeds reasonable limits those who deal with him do so at their peril, and no unfairness will be tolerated. Thus a contract with a manager defrauding the family is not enforceable (h) and the manager is not allowed to retain a double share in what he has acquired in that position. (i)

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(a) *Comp. Joykisto Cowar v. Nittyanund Nunty*, I. L. R. 3 Calc. 738.

(b) *Samalbhai v. Someshvar et al*, I. L. R. 5 Bom. 38.

(c) *Gundo v. Rambhat*, 1 Bom. H. C. R. 39.

(d) *Baji Shámráj v. Dev bin Báláji*, H. C. P. J. F. for 1879, p. 238.

(e) *Trimbak v. Gopalshet*, 1 Bom. H. C. R. 27; *Comp. Mit. Chap. I. Sec. I. para. 32*; *Steele*, L. C. 54, 209.

(f) *Rámlál v. Lakmichand*, 1 Bom. H. C. R. at pp. 72, 73, Appx.; 1 Str. H. L. 202; *Comp. Kumarsami v. Pala N. Chetti*, I. L. R. 1 Mad. 385; *Chetty Colum Comara Venkatachella Reddyar v. Raja Rungasami*, 8 M. I. A. at p. 323.

(g) 1 Str. H. L. 199; 2 *ibid.* 344, 434, 457; *Coleb. Dig. Bk. I. Chap. V. T. 180 ss*; *Bk. II. Chap. IV. T. 54, Comm. sub fin*; *C. Colum Comara Venkatachella v. R. Rungasawmy*, 8 M. I. A. at p. 323; *Bullakidass v. Ghama*, Bom. H. C. P. J. F. for 1880, p. 224; *Babaji bin Mahadji v. Krishnaji*, Bom. H. C. P. J. F. for 1878, p. 149.

(h) *Ravji Janardhan v. Gungádhurbhat*, I. L. R. 4 Bom. 29.

(i) *Guruchurn Doss v. Goluckmoney Dossee*, 1 Fult. 165, a Bengal case, but agreeing with *Megha Sham v. Vithalrao*, cited below, Sec. 7 A; and *Daolatrao's case*, above, p. 634 note (f).

In suits against the family or to affect its common estate all the members must, under ordinary circumstances, be made defendants, (a) though under special circumstances the manager may as manager be sued so as to bind the whole family, (b) as indeed it would seem may a member not a manager, or not sued expressly as manager, but deemed under exceptional conditions to have represented the family. (c) Apart from such cases as these a suit and a decree against a manager individually affect only his own share in the common estate, even though he may have contracted the liability for the benefit of the family. That question it is thought cannot properly be disposed of without the several members being called before the Court, (d) and the sale of the "right, title, and interest" of the manager gives to the purchaser no more than is expressly sold. (e) Thus it was held that a decree obtained against the manager alone (not the father) and a sale under such a decree, did not bind the property beyond the manager's own share, (f) and that the brother of the manager ousted by the purchaser in execution

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(a) *Annaya v. Hoskeri Ramappa*, H. C. P. J. F. for 1875, p. 227 ; *Bhimasha v. Ramchandarsa*, H. C. P. J. F. for 1878, p. 286. As to suits by a family, see above, p. 608.

(b) See above, p. 615.

(c) *Narayan Gop Habbu v. Pandurang Ganu*, I. L. R. 5 Bom. 685, referring to *Jogendro Deb Roy Kut v. Funindro Deb Roy Kut*, 14 M. I. A. at p. 376, and *Mayáram Sevarám v. Jayavantrao Pandurang*, Sp. Ap. No. 435 of 1873, I. L. R. 5 Bom. 687.

(d) *Mahábaláyá v. Timíyá*, 12 Bom. H. C. R. 139 ; *Idem bis* H. C. P. J. for 1879, p. 417 ; *Nhanu Lukshman Golam v. Ramchandra Vinayak*, H. C. P. J. F. for 1882, p. 277 ; *Baji Shamraj Joshi v. Dev bin Balaji*, H. C. P. J. F. for 1879, p. 238.

(e) Comp. the case of a widow's estate only passing under a decree against her for arrears as a charge, *Baijun Doobey v. Brij Bhookun Lal*, L. R. 2 I. A. 275.\*

(f)\* This is quoted and followed in *Kisansing v. Moreswar*, Bom. H. C. P. J. 1882, p. 396, referring to *Deen Dyal's* case as conclusive that the son's interest does not pass by a sale in execution of the father's.

might recover possession of the whole (a) leaving the purchaser to work out his right by a suit for partition. (b) This is exactly the reverse of the rule in the case of a sale in execution of a decree against the father on an ordinary debt, as recently expounded at Madras. (c)

Subject to the foregoing observations the presumption in favour of the good faith of transactions entered into by a father (d) or uncle as manager of an ancestral estate is naturally somewhat stronger than in the case of more distant connexions or of women not familiar with business. (e) But even as to the father the principle laid down in *Suraj Bunssee Kooer's* case has always prevailed in Bombay. The family under the father's headship is like any other united

(a) In *Gopalasami v. Chokalingam*, I. L. R. 4 Mad. 320, possession under a sale in execution against a father was held to throw on his son the burden of proving that the original debt was illegal or immoral. Compare *Gurusami's* case quoted above.

(b) *Muruti Narayan v. Lilachand*, I. L. R. 6 Bom. 564.

(c) *Velliyammal v. Katha*, I. L. R. 5 Mad. at p. 68, explaining *Ponappa Pillai v. Pappuvayangar*, I. L. R. 4 Mad. 1.

(d) See *Babaji v. Krishnaji*, I. L. R. 2 Bom. 667.

(e) As to a father, see *Babaji Sakoji v. Ramshet Pandushet et al*, 2 Bom. H. C. R. 23. As to an uncle see *Bhaoo Appajee v. Khundojee*, 9 Harr. 104, and generally *C. Colum Comara Vencatachella v. R. Runganwamy*, 8 M. I. A. at p. 323; *Tandaraya Mudali v. Valli Ammal*, 1 M. H. C. R. 398; *Gour Chunder Biswas v. Greesh Chunder Biswas et al*, 7 C. W. R. 121 C. R.; *Musst. Nouruthum Kooer v. Baboo Gouree Dutt Singh et al*, 6 C. W. R. 193; *Heerachand v. Mahashunker*, S. A. No. 3918, 6th July 1858; 2 Str. H. L. 331, 348; *Shidramapa Balapa v. Shesho Janardhan*, S. A. No. 178 of 1874, Bom. H. C. P. J. F. for 1875, p. 61.

The manager is not to be called to a rigorous account, nor on the other hand to claim credit as against the family for disbursements in excess of his proper share on account of it, *Davlatrdo Rdmrdo v. Nardyanrdo Khanderdo*, R. A. No. 51 of 1876; Bom. H. C. P. J. F. for 1877, p. 175; see for Bengal *Abhaychandra Roy v. Pyari Mohan Juho et al*, 5 B. L. R. 347. An alienation by a Kartá is binding on any member who consciously stands by and sees

family except that the father is manager (a) by nature, unless disqualified or deposed, (b) and a manager whose transactions may be strongly presumed to be intended for the good of the family. (c) If however they are not for its good but plainly detrimental there is perhaps no case prior to *Narayanacharya v. Narso Krishna* (d) which makes the family estate liable because they are not otherwise immoral. (e) Any transaction

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the money applied without refusing to participate, *Madhoo Dyal Singh v. Golpar Singh et al*, 9 C. W. R. 511; *Ramkeshore Narain Singh v. Anand Misser*, 21 *ibid.* 12 C. R., and the case in Hay's Rept. 567; *Bhimasha bin Dongresha et al v. Krishnabai*, Bom. H. C. P. J. F. for 1878, p. 286. The ruling in *Ramlal v. Lakhmichand Muniram et al*, 1 Bom. H. C. R. li, lxxi. App., that the manager of a joint estate, the capital of a firm, has authority to deal with it for the purposes of the business, is cited and approved in *Johurra Bibee v. Sreegopal Misser*, I. L. R. 1 Calc. p. 475; *Samalbhair Nathubhai v. Sameshvar Mangal and Hurkisan*, I. L. R. 5 Bom. p. 38; see Coleb. Dig. Bk. II. Chap. IV. T. 54, Comm.

(a) Above, pp. 604, 608. In Steele, L. C. 238, it is said that the father's gift of immoveable ancestral property is invalid unless attested by the heirs.

The Hindu law generally requires the attestation of the members of the family enjoying an unobstructed right of inheritance (i.e. a quiescent co-ownership) to a *dānpatra* or deed of gift, to which, according to that law a conveyance for value is assimilated. See Vyav. May. Chap. II. Sec. I. para. 5; Coleb. Dig. Bk. I. T. 19; above, p. 192, note (c). This attestation, as the document is ordinarily read out, implies assent to its contents, as formerly in England, see Coleb. Dig. Bk. II. Chap. IV. T. 33 Comm.; *Pandurang v. Naru*, Sel. Rep. 186; Introd. to Bk. I Sec. 9, p. 223 above, and the Śāstri's opinion in *Doe v. Ganpat*, Perry's O. Cases, at p. 137.

In *Nagalutchmee Ammal v. Gopoo Nādarāja Chetty*, 6 M. I. A. at p. 341, the Judicial Committee observe, "These witnesses, one and all, depose to the fact of the signature of these papers, to their being written from the dictation of the testator." &c.

(b) Vyav. May. Chap. IV. Sec. IV. para. 7.

(c) See above, p. 637 notes (d) and (e).

(d) I. L. R. 1 Bom. 262.

(e) See *Narayan v. Balkrishna*, I. L. R. 4 Bom. 529, and comp. *Sham Narain Singh v. Rughoobindial*, I. L. R. 3 Calc. 508.

is forbidden which tends to reduce the family to want. (a) This has not been regarded by the usage of the Hindûs in Bombay as a merely pious precept, but as a law properly so called, (b) and has been relied on by the Courts against improper alienations and incumbrances of the patrimony. (c)

Applications for an interdiction (d) against a father could never be common amongst the Hindûs; but when a father was getting rid of the patrimony the Śâstri said that an interdiction might be obtained and the transaction rescinded at the suit of the son or of the united brother. (e) When a Joshi proposed to give away his vatan he was restricted to a small portion of it. (f) A father could for incapacity be superseded or set aside as manager in favour of his son. (g)

It appears therefore that the father as manager stands substantially in the same position as any other manager. The care of the family, the preservation of the common estate, and the payment of debts, are more especially incumbent on him. (h) In *Nagalutchmee Ammâl v. Gopoo*

(a) See above, pp. 207, 208; Coleb. Dig. Bk. II. Chap. IV. T. 11, 18, 19; Vyâsa, cited Dâya Bhâga, Chap. I. para. 45; Mit. Chap. I. Sec. 1, para. 27; *Id.* Comm. on Yâjñ. II. 47—50 in Appendix; 2 Str. H. L. 5, 12, 16.

(b) See *Bai Gunga v. Dhurmdas*, Bell, R. 16; 2 Str. H. L. 449.

(c) In *Narsinha Hegde v. Timma*, Bom. H. C. P. J. 1882, p. 394, the District Judge was directed to inquire whether the creditor had *bond fide* supposed that the debt was incurred for the benefit of the family by the father.

(d) Mit. Chap. I. Sec. VI. para. 9.

(e) Q. 1935, MS.

(f) Q. 711 MS. Comp. 2 Str. H. L. 16, 12.

(g) See Steele, L. C. 178, 216; Vyav. May. Chap. IV. Sec. IV. para. 7.

(h) *Ramchandra D. Naik v. Dâda M. Naik*, 1 Bom. H. C. R. 86 App.; see Yâjñ. Bk. II. para. 46; Nârada, Bk. II. Chap. III. paras. 11, 12, 13; Manu IV. 257; Vyav. May. Chap. V. Sec. 4, para. 11.; Steele, L. C. 68. See H. H. Wilson, quoted below, Bk. II. Ch. I. Sec. 1, Q. 4, Remark.

*Nádarāja Chetty* (a) the Pandits thought a will would be invalidated by a permission to adopt acted on. They say: "The will.....is valid.....the testator having thereby bequeathed a portion of his estate for the maintenance of his wife and other members of his family whom he was bound to protect, and directed the remainder to be appropriated to charitable purposes in the event of his wife, who was then pregnant, not being delivered of a son." The conditions give effect to the Hindû law against disinheriting a son, and in favour of the maintenance of dependants as a duty not to be evaded by means of a disposal of the estate by its owner. In the case of an ancestral estate it does not seem that the father can really be deemed owner in a sense that does not apply equally to any of his sons. No member of an undivided family "has a certain definite share," (b) much less has one co-owner a right as such to dispose of the whole. (c) The father's natural relation to his children entitles him at the same time to more than ordinary confidence. Hence it is that in such cases as *Babaji v. Ramshet* (d) the sons seeking to upset their father's alienation of family property were called on to prove that the transaction had been one not binding on their shares. (e) The authority to alienate was not thought wider in his case than in that of another manager; only his good intentions were rather more strongly presumed.

The doctrine of the Bombay Court appears to be warranted, not only by the case of *Suraj Bunsee Kooer*, but by what is

(a) 6 M. I. A. at p. 320. Comp. the case in note (b), p. 639 above.

(b) *Appovier v. Rama Subbayana*, 11 M. I. A. at p. 89; *Rangama v. Atchama*, 4 M. I. A. 103; *Girdhari Lal v. Kantoo Lall*, L. R. 1 I. A. at p. 329.

(c) Mit. Chap. I. Sec. 1. para. 24; Vyav. May. Chap. IV. Sec. 1, paras. 3, 5; Sec. 4, para. 4.

(d) 2 Bom. H. C. R. 23. There is in many such cases a suspicion of fraud, as in the one referred to in *Hanooman Persad's* case.

(e) It may be noted that the Mitáksharâ distinctly imposes on a father's creditor the burden of making his case good against sons denying his claim; Comm. on Yājñ. II. 50.

said in *Baboo Kameswar Pershad v. Run Bahadur Singh*. (a) "Their Lordships have applied those principles.....to transactions in which a father in derogation of the rights of his son under the Mitâksharâ has made an alienation of ancestral family estate. The principle.....is that.....the lender is bound to inquire into the necessities for the loan and to satisfy himself as well as he can.....that the manager is acting in the particular instance for the benefit of the estate.....a *bonâ fide* creditor should [not] suffer when he has acted honestly and with due caution but is himself deceived." This ought apparently to be conclusive as to the nature of the father's authority when dealing or affecting to deal with the joint property of himself and his sons. It would be so but for the difficulties created by other cases which, in order to enforce the obligation resting on sons after their father's death, have apparently assigned to the father a capacity of himself discounting that liability during his life by alienating the patrimony in ways not consistent with his duty as manager. In the case of *Kastur Bhavâni v. Appa*, (b) sons, including two minors, sued to recover ancestral lands sold by their father to pay a debt. The debt had been originally incurred by the grandfather. It was alleged to have been contracted or increased for immoral purposes, but this was not proved, though it was proved that the father was addicted to drinking. The District Court held the sale invalid except as to the father's share, as not having been proved to be necessary, but in the High Court it was re-established on the ground that the sons had not proved, as they were on their plaint bound to prove, that it was made for an immoral purpose, they having relied on that express ground. A misapplication of a trivial sum would, it was suggested, probably make no difference. (c)

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(a) L. R. 8 I. A. at p. 11.

(b) I. L. R. 5 Bom. 621.

(c) Before the birth or the adoption of a son an owner may deal with the property free from question by a son subsequently born or adopted, *loc. cit.* and *Rambhat v. Lakshman Chintaman*, I. L. R. 5 Bom. 630.



The cases of *Girdhari Lál v. Kanto Lál* (a) and of *Muddun Gopal Lál v. Mussamut Gowraubutty* (b) are referred to, but only on the point just noticed. As a mere member of a united family the father has been held answerable in his own share on a partition for his personal debts (c) in the same way as any other coparcener. This is shown by the cases already referred to. (d) A suit brought against a father alone will not in ordinary cases bind his sons as to the ancestral property. They must be made defendants if they are to be affected by the decree. (e) The principle extends to the case of a son born, and even to one adopted, *pendente lite*. (f) In this respect therefore the father stands on the same footing as an ordinary manager. A suit against him may affect the whole family in its estate, but this is exceptional, and a sale under a decree in such a suit could not in general extend to more than the father's own share on a partition.

Sons however must discharge their father's debt after his death. (g) Along with this there are precepts

(a) L. R. 1 I. A. 321.

(b) 15 Beng. L. R. 264.

(c) See *Narayanrao Damodar v. Balkrishna*, I. L. R. 4 Bom. 529, 534.

(d) In the N. W. Provinces the same doctrine seems sometimes to have prevailed, see *Nanhak Joti's* case, above, p. 618. The Pandits at 14 of the N. W. P. S. A. Report for 1857, said that two sons could recover their shares of ancestral property sold in execution of a decree against the father unless the debt was incurred for the benefit of the family. In *Ramchandra and Lakshman v. Raoji Sakham*, Bom. H. C. P. J. for 1882, p. 381, the issue sent down for trial was "Was the debt secured by the mortgage of plaintiff's father ..... contracted for a legal and moral purpose?"

(e) See above, p. 168.

(f) See *Rámhat v. Lakshman Chintaman Mayalay*, I. L. R. 5 Bom. 630, 635, where the owner's uncontrolled power of gift before, and his limited power after, the birth of a son are clearly defined by Sir M. Westropp, C. J.

(g) Vyav. May. Chap. V. Sec. 4, para. 12 ss.

laying the duty on him who takes the estate and exonerating the son kept out of it. (a) It is a reasonable inference that the estate taken by the sons is, as such, answerable in their hands (b) for the debts for which they are morally liable. (c) The liability is independent of assets where there are none, (d) and this affords an indication of the kind of debts that can properly be regarded as charges on the estate. (e) Those only which were excusably incurred are binding. (f) As the result is substantially the same it would seem that the father may make such debts a direct charge on the estate after his own death. (g) But for all instruments executed by the father as by others the general rules hold good which refuse them validity if made under disturbing influences which deprive them of the character of free and intelligent expressions of volition. (h) None of the texts however which establish this liability, nor any of the Commentators on them, say that a son's liability for his father's debts arises during the father's life. (i) Nor has any response of a Śāstri been found in favour of such a liability. There are

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(a) Vyav. May. Chap. V. Sec. 4, para. 16; Coleb. Dig. Bk. I. Chap. V. T. 171.

(b) See above, p. 77, 80.

(c) Vyav. May. Chap. V. Sec. 4, para. 13.

(d) *Ib.* Yājñ. Bk. II. para. 51; Nārada, Bk. II. Chap. III. para. 6, quoted Coleb. Dig. Bk. I. Chap. V. T. 188; Steele, L. C. 312; 2 Str. H. L. 274, 277.

(e) "The obligation.....has respect to the nature of the debt, not.....of the estate," Judicial Committee in *Hanooman's* case, 6 M. I. A. 421.

(f) Manu VIII. 166, says: "if the money was expended for the use of his family." See Steele, L. C. 217.

(g) This is the effect of *Hanooman Parsad's* case (see above, p. 166), if it is generalized beyond the case of an ancestral debt made a charge by the father, which was all the Judicial Committee dealt with.

(h) Vyav. May. Chap. II. Sec. I. p. 10; Nārada, Pt. I. Chap. III. para. 43; Pt. II. Chap. IV. paras. 8, 9; 2 Str. H. L. 14.

(i) See above, p. 164; and below, Bk. II. Ch. I. Sec. 1, Q 5.

many texts which imply the contrary. Vishṇu says the sons or grandsons must pay when the debtor is dead or has been absent twenty years, that is when he may be presumed to be dead, not before. (a) Manu says simply when the father is dead. (b) Bṛhaspati (c) says the sons must pay even in the father's life but only in cases in which he is incapable of acquiring property or retaining it. The exception here is conclusive as to the rule, at least as it was understood by the school that produced this Smṛiti, which is sacred everywhere. The same observation occurs as to Kātyāyana's text (d) quoted in *Nārāyanachāryā's* case. (e) So too as to Nārada's text on the subject. (f) The whole series quoted by Jagannātha imply a liability only after the father's natural or civil death or its equivalent, and so they have invariably been understood by native lawyers reading them with the context. The case may be stated even more strongly. There is no text imposing on sons a liability during their father's life for debts incurred even for the benefit of the family, (g) except in cases in which the father is not capable of managing the estate and affairs of the family, and the sons are. (h) It is impossible that of the numerous texts treating of debts contracted for the family and of the sons' liability as survivors of their father all should have omitted to mention their liability during the father's life had the liability been recognized. But the father is regarded as alone responsible, and alone having administrative control as the head of an

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(a) 2 Str. H. L. 237; Vishṇu, Transl. page 45; Coleb. Dig. Bk. I. Chap. V. T. 168; 1 Str. H. L. 188; 2 *ib.* 237, 316; Steele, L. C. 34.

(b) VIII. 166.

(c) Coleb. Dig. Bk. I. Chap. V. T. 178.

(d) T. 177.

(e) I. L. R. 1 Bom. at p. 266.

(f) Pt. I. Chap. III. paras. 14, 15.

(g) See the answer to Chap. I. Sec. 1, Q. 5, below.

(h) See Yājñ. Bk. II. para. 45; Coleb. Dig. Bk. I. Chap. V. T. 167, 168, 177, 178; 2 Str. H. L. 81, 277, 326.

undivided family. (a) Debts even for its benefit cannot, it is said, be contracted against his prohibition (b)—a doubtful proposition—but one which shows how his position was understood by a learned native lawyer. The Vyav. Mayûkha, the chief local authority in Bombay, (c) dwells elaborately on the debtor's obligations, but says nothing about any obligation of the sons except on their father's death or prolonged absence. (d) The Mitâksharâ itself, in commenting on the texts of Yâjñavalkya in the untranslated portion on "Vyavahâra," construes them as imposing a duty only after the father's death, his absence for twenty years, or on his imbecility. It then transfers the liability to the new head of the household if there is one, (e) or to the sons jointly if there is not.

It seems therefore that the decision in *Jamiyatram's* case, giving to the father in a united family virtually unlimited power over the whole ancestral estate, on condition only that his behaviour is not scandalous, cannot be rested on the Hindû law as the people have received it in Bombay. (f) The acknowledged authorities do not support it, and the usage of the people has conformed to these authorities. A reference to Steele's Law of Caste establishes this, (g)

(a) Comp. Ellis in 2 Str. H. L. 321, 326, and above, p. 281. On his death or incapacity the eldest son succeeds unless disqualified, as in ancient times he took the *patria potestas*. See Manu IX. 106 ss., 126.

(b) Coleb. Dig. Bk. 1. Chap. V. T. 194. The Vyav. May. Chap. V. Sec. 4, para. 20, and the Mit., Chap. on Vyavahâra, prescribe the duty of payment without any qualification. See too Coleb. Oblig. p. 24; Vishnu, Tr. p. 45, 46.

(c) *Sakharam v. Sitabai*, I. L. R. 3 Bom. at p. 367.

(d) Vyav. Mayûkha, Chap. V. Sec. 4.

(e) Comp. 2 Str. H. L. 252, 326.

(f) Comp. *Lallubhai v. Mankuvarbhai*, I. L. R. 2 Bom. at 418, 448; as to the force of this reception S. C. L. R. 7 I. A. 212, 237.

(g) i.e. by treating the liability for debts as one arising on the father's death in all places where the point occurs. Alienations without the assent of heirs are pronounced invalid, *ib.* 68, 238; or at most good only for the grantor's share and during his life, *ib.* 237.

and the MS. collection of Caste Customs made by Mr. Borradaile, while it shows that the father's debts were regarded as a burden on the estate in partition, does not assert any liability of the sons during his life. It appears indeed that in the great majority of castes the father's debt and the family debt are not distinguished. Partition against the father's will during his life is not allowed. (a) He is manager while capable, and all his debts are *primâ facie* incumbent on him alone, (b) passing to his sons only on his death subject to exceptions on the usual grounds. (c)

The decision in *Jamiyâtram's* case conforms to that in *Girdharilal v. Kantoolal*, but the question remains of whether the latter expresses the Hindû law of Bombay. The father's share may be made separately available, as in Bengal it could not when *Girdharilal's* case was decided. The son's right is a co-ownership entitled to protection against a careless or designing creditor of the father; and there is no hardship in controlling the father's right to sell what he did not buy. When it is said that *Hanooman Pershad's* case "is an authority to show that ancestral property which descends to a father under the *Mitâksharâ* law is not exempted

(a) See below.

(b) The absence of rules for a partition enforced by the sons in the father's life is an evidence of the comparatively late introduction of this doctrine. The same inference arises from the want of a rule for the partition of debts in a partition between the father and sons, which in the case of a partition amongst the sons only is always provided for. It seems that the three stages of development were (1) a moral claim of the sons and a still stronger moral duty of the father to preserve the patrimony; (2) an advance of the son's right to co-ownership, the father being still ex-officio manager; (3) the son's acquisition in virtue of co-ownership of a right to partition of the patrimony, comp. p. 209 above, and the *Dâya Bhâga*, Chap. II., Stokes, H. L. B. pp. 200 ss., and the *Dâyakrama Sangraha*, Chap. VI. *ib.* p. 511.

(c) The exceptions are not explicitly stated, no question having been put on that point. See Steele, L. C. 40, 178, 217.

from liability to pay his debts because a son is born to him," the remark occurs that their Lordships in the earlier case did not decide as to debts in general, only as to an ancestral debt made a charge by the father. Secondly it may with deference be pointed out that the *Mitāksharā* itself in dealing expressly with the subject in a chapter which was not before their Lordships on either occasion, treats of the payment of debts in such a way as to make it clear that no liability of a son for his living father's debt is recognized. The estate may be answerable, and the son's share in it, but simply through the father's authority as manager. This enables him to create burdens for purposes necessary and beneficial to the family, but not for other purposes though these should not be "immoral." (a) The point in *Hanooman Pershad's* case was that as an ancestral debt descended to the father he was *primā facie* bound to pay it, (b) and hence justified in applying the ancestral estate to that purpose, (c) and therefore the manager for his infant son might properly recognize the charge as binding on him. The conversion of such an obligation inherited by a son into a liability to have all his property alienated by his father while they are both alive (d) in order to furnish means for the father's needless expenditure is a process which, so far as can be discovered, the "usage of the country" or the "laws and usages of the Gentoos," have not performed in Bombay.

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(a) See above, p. 166 ff; Steele, L. C. pp. 40, 265.

(b) Amongst the Marāthās this obligation extends to all debts incurred during the son's infancy, and to those incurred after his majority for *Saṁsār*, or the discharge of moral and ceremonial duties. Steele, L. C. 40.

(c) See *Kātyāyana* in *Vyav. May. Chap. V. Sec. 4, para. 14.*

(d) The duty arises from "sonship" and must be discharged out of a son's own property. It rests therefore on a separated son. If then the "pious duty" towards a father deceased is convertible into a legal obligation to a father alive, with a corresponding right in the father, it would seem that the separated son's property equally with that of the son unseparated, may be disposed of by a father or sold in execution of a decree against him for a debt not "immoral."

The English connotation of the word "heir," as denoting one succeeding his ancestor but only succeeding, not participating with an equal right, is misleading in the case of a son's relation to his father as regards the Hindû "heir" so called. (a) The birth of a son necessarily causes a diminution of his father's estate, by the introduction of an owner in

(a) See above, pp. 66, 238. This participation is not in theory limited to the ancestral estate: it extends to all immoveable property, with some special exceptions.

A father cannot, according to the doctrine of the *Mitâksharâ*, Chap. I. Sec. 1, para. 27, dispose of his immoveable property, even though acquired by himself, without the assent of his sons, except in a case of urgent need, Steele, L. C. pp. 39, 54. The reason given is the duty of providing for the family, and this must limit the administrative independence assigned to him over his acquisitions by Chap. V. Sec. 10, supposing the latter extends to immoveable property. Colebrooke seems to recognize this at 2 Str. H. L. 436. At p. 439 he states the same doctrine as undoubtedly that of the *Smṛiti Chandrikâ*, and at p. 441 as that of the *Mâdhaviya*. At p. 444 Sutherland says no part of the *Dâya Bhâga* (of *Jimûta Vâhana*) is so unsatisfactory as that which maintains the right to dispose of self-acquired immoveables, and at p. 445 that according to the Mithila and the Benares (*Mitâksharâ*) Schools a man is free to give away only his moveable property. The *Śâstri* of the Recorder's Court at Bombay says, p. 449, that alienation of immoveable property is forbidden, and of moveable property also, except as to the surplus beyond the needs of the family. Such, he says, is the usage of the country, and this is confirmed by Steele, L. C. pp. 68, 211, though some castes maintain the power of the acquirer over his own acquisitions, *ib.* 237; and the authority of the manager is by some castes extended beyond the warrant of the sacred writings, *ib.* 53, 54, 209.

Though the power of a Hindû to deal as he pleases with his acquired property cannot now be questioned, Steele, L. C. 54, 211; above, pp. 193, 206, 209; it does not seem reconcileable with the principles of the Hindû law, as thus stated by high authorities, that a father should be at liberty to cast off his obligations to his family, or that he should be able not only to burden his sons with his debts after his death, but also to alienate even the ancestral estate in their despite during his life. The duty of the son to pay his father's debts is regarded by the Hindu law as a "pious obligation," and as such limited by the equally pious obligation of maintaining the family

common with the father, (a) and thenceforward the father's acts are those of a manager. His death throws a new burden on the son, as the son's birth partly divested the father's estate, but the death equally with the birth is a necessary condition of the jural change. (b)

It may be added that nowhere amongst the provisions of the Hindû law for enforcing payment of debts (c) is such a process as the attachment and sale of the lands of a family mentioned. Jagannâtha's discussion of the subject (d) makes it plain that the connexion between an owner and his land was conceived by the Hindû lawyers as by the earlier Romans (e) as separable only by his own volition, however that

where the two duties come into competition, *see* above, p. 207; below, Appendix; and *Dâyakrama Sangraha*, Chap. VI. para. 5; Stokes, H. L. B. p. 510; *Vyav. May.* Chap. IX. para. 5, *ib.* p. 134; though the son must make any merely personal sacrifice.

(a) *See Bâmbhat v. Lakshman Chintaman Mayâlay*, I. L. R. 5 Bom. at p. 635, per Sir M. Westropp, C. J., and the authorities there cited.

(b) *See per White, J., in Bheknarain Singh v. Januk Singh*, I. L. R. 2 Calc. 438, 443. The son, if a minor at his father's death, becomes responsible only on attaining his majority, according to the Mit. and *Vyav. May. loc. cit.* *See* also 2 Str. H. L. 76, 80, 279. This indicates a personal obligation to be satisfied no doubt out of the estate if there is one, but not in the proper sense a charge on it as in the case of a specific lien legally created.

(c) For the process employed amongst the Marâthâs, *see Vyav. May.* Chap. IV. Sec. 4, para. 7; Wilson's Glossary "*Âsedha*"; Steele, L. C. pp. 74, 267. For the sacredness of the debtor's obligation for a debt incurred to celebrate one of the necessary ceremonies, *ib.* p. 60. By the ancient Common Law of England execution could not be had for debt or damages against the land or the person of the debtor, only against his chattels and corn, Coke, 2 Inst. 394; Co. Rep. Part III. 11 b.; Vin. Abr. Execution (M).

(d) Coleb. Dig. Bk. II. Chap. II. T. 24, Comm. *ad. fin.*; T. 27, 22, Comm.

(e) *See Mommsen, Hist. Rom.* Vol. I. p. 169, 311; Maynz, Dr. Rom. Sec. 243, 380. How very gradually the English law admitted the charging of the estate with debts may be seen in Blackstone's Comm. Bk. II. Chap. XIX.



might be influenced. Attachment and sale in execution therefore are entirely the creatures of British legislation. They belong wholly to the province of procedure; and the title sold cannot, it would seem, be enlarged beyond that vested by the substantive law in the party sued, and whose "right, title, and interest" as a Hindû father of a family is put up to auction to satisfy his creditor. (a)

Amongst the male members of an ordinary Hindû undivided family, a suit by one member against another for maintenance is not sustainable. The right arises only (in such a case) through disability to inherit (b), but it lies by a son against his father holding impartible property. (c) In such property is included a pension allowed as commutation for a resumed Saranjâm. (d) The father's maintenance is the first consideration. That being once provided for, the indigent sons have, according to the Hindû Law, a claim on the surplus, so far as it extends, for their maintenance. (e) In answer to Q. 1884 MS., the Dhârwar Śâstri (6th October 1854,) says, "It is not right for a son, however young, to claim support from his father. But a father should afford a maintenance to a child, and, if there be hereditary property, to the extent of the son's share." The

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(a) The great practical importance of this subject may be pleaded as a justification for dealing with it at such length. The authority said to be vested in the father to waste the patrimony so long as he avoids spending it on the acts included in "immorality," makes the position of every Hindû son in a state of union with his father unsafe. *Suraj Bunsee Kooer's case*, L. R. 6 I. A. at p. 100, says the son may claim a partition at will. Thus a motive and a means are held forth which tend at least to a complete break-up of the Hindû family system, and may lead to very serious consequences unless the whole subject is comprehensively dealt with by the legislature.

(b) *Himmatsing v. Ganputsing*, 12 Bom. H. C. B. 96; *Agursangji v. Gagji Khodabhai*, *ibid.* 96 Note (a).

(c) *Himmatsing v. Ganputsing*, *ibid.* 94.

(d) *Râmchandra Sakhârdm v. Sakhârdm Gopal*, I. L. R. 2 Bom. 346.

(e) See Coleb. Dig. Bk. V. T. 23, Comm.; 2 Str. H. L. 321; Steele, L. C. 40; Mit. on Yajñ. II. 175, translated in Appendix.

Śāstri seems to have relied on Manu, as cited in Coleb. Dig., Bk. V., T. 379, Comm., and 2 Macn. H. L. 114, to the effect that aged parents, a wife, and an *infant* son must under all circumstances be maintained; the last words of which being ambiguous (Coleb., Note *loc. cit.*) are differently taken in the Mitāksharā. (a) In the case of *Ramchandra Dada Naik v. Dada Mahadev Naik*, (b) Sausse, J., after holding that a partition of the hereditary estate could not be enforced by a banker's son against his father, says "I do not think that the abstract question of the right of a son to enforce maintenance (in a Hindû sense) from his father arises here. If I thought it did I would overrule the demurrer, for there is no clearer duty imposed upon a Hindû father than that of giving 'food, raiment, and shelter' not only to a son but to any member of his family." (c)

§ 3A. A family living in union may be either (A) undivided (*avibhakta*) or (B) reunited (*sañsṛishṭa*).

A. An undivided family consists:—

1. Of an ancestor and his descendants (d).

2. The descendants of a common ancestor.

The descendants must be legitimate descendants of the body, or else legally adopted sons or their descendants, (e) except in the case of Śûdras, where illegitimate sons have a

(a) See Bk. I. Chap. II. Sec. 1, Q. 2; 1 Str. H. L. 67; Smṛiti Chandrikā, Chap. II. Sec. 1, paras. 31, 32.

(b) 1 Bom. H. C. R. App. at p. lxxxiv.

(c) See *Suraj Bunssee Kooer's case*, *supra*, and the remark in *Lakshman Dada Naik v. Ramchandra Dada Naik*, L. R. 7 I. A. at p. 193.

(d) Two widows, it has been said, succeed jointly to the estate of their deceased husband. But they do not form an undivided family in the proper sense, and they are perhaps regarded by the Hindû Law rather as holding several, though indiscriminated, shares in the property. See above Bk. I. Chap. II. Sec. 6 A. Q. 6, p. 124; 2 Str. H. L. 90.

(e) See 2 Str. H. L. 312.

capacity to form a united family *inter se*, probably also with their legitimate half brothers, (a) and at any rate have rights analogous to those of legitimate sons. (b) The right of descendants extends only to the third degree from an ancestor, living undivided and being the head of a family or of a particular branch. (c) Thus:—

(1). If A, A<sup>1</sup>, A<sup>2</sup>, A<sup>3</sup>, and A<sup>4</sup> live together, and A<sup>1</sup>, A<sup>2</sup>, and A<sup>3</sup> predecease A, then A<sup>4</sup> will have no immediate claim to a share of A's property, *see* No. 1 in (d).

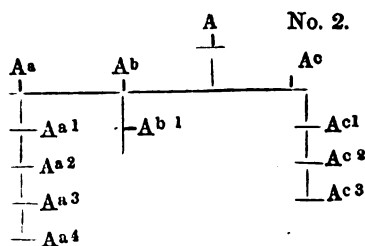
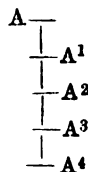
(2). If A<sup>a</sup>, with his four descendants, A<sup>b</sup> and A<sup>c</sup> with their one and three descendants respectively, live together, and A<sup>a</sup>'s first, second and third descendants predecease A<sup>a</sup>, and if A<sup>a</sup> die afterwards, then A<sup>a4</sup> will have no claim to a share of the family property, *see* No. 2 in. (d)

(a) *See* p. 382-3, Q. 10 and 12, Remarks.

(b) As to the *paunarbhava*, or son by a twice-married woman, *see* Sutherland's Note, 2 Str. H. L. 208. The *Paunarbhū* is there classed in three divisions, differing, in description, from those given by Nārada, Pt. II. Chap. XII. paras. 46 ss. As to the *svairini* or disloyal wife, *see* Nārada, l. c. paras. 50 ss. The heritable right and consequent right to shares in a partition of sons of paunarbhū depends, Sutherland says, on local custom. *See* above Bk. I. Chap. II. Sec. 3, p. 386.

(c) *See* 2 Str. H. L. 327; Vyav. May. Chap. IV. Sec. 4, paras. 21, 22; Manu IX. 185; Coleb. Dig. Bk. V. T. 81, 394, 396, Comm. Viśveśvara, in the Subodhini on Mit. Chap. I. Sec. 1, p. 3, seems to admit that the doctrine of representation may be carried down even beyond the great-grandson, but the latter is generally admitted only after the near relatives, specifically enumerated as heirs.

(d) No. 1.



The principle operating here is the same as that applying to the Law of Inheritance in an undivided family. (a) In the case at 2 Macn. H. L. 150, the maternal grandfather having given property to four brothers, the son of one of them, they having been united, was allowed to obtain a partition from his uncle, the survivor of the four. (b)

Males only can be the subjects of the full rights of coparceners. But women, *ex. gr.* wives, mothers, grandmothers, and daughters possess latent or inchoate rights of participation, which become effective when separation takes place. (c) If a widow has been placed in possession of a part of the common estate in order to provide her with subsistence, she can be ousted only through a suit for a general partition, (d)

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(a) See Book I. Introduction, p. 73.

(b) This case might perhaps be more properly referred to the principle stated below, Sec. 5 A, that a gift to united brethren without discrimination constitutes joint property; but it illustrates the right of the co-members to enforce partition, even of recent acquisitions, ranking as joint estate. Had the gift been made in separate shares, the son of one donee would have had to claim by inheritance, not by partition.

(c) "The mother's right to a specific allotment arising only when a partition is made," *Coleb. at 2 Str. H. L. 290*. See *Ramappa Naiken v. Sithammál*, I. L. R. 2 Mad. at p. 186; *Sibbosondery Dabia v. Bussoomutty Dabia*, I. L. R. 7 Calc. 191; *Narbadábái v. Mahádeo Náráyan*, I. L. R. 5 Bom. 99 (step-mother). According to the usage of some of the lower castes in Gujeráth the mother must take part in a partition by her sons: it cannot proceed without her co-operation or at least her consent. Many instances of this occur in Borradaile's Collection. See below "RIGHTS AND DUTIES ARISING ON PARTITION."

(d) *Anpoornabái v. Máhadevdo Balwant*, R. A. No. 13 of 1872, Bom. H. C. P. J. F. for 1872, No. 192. See *Rajabái v. Sadu*, 8 Bom. H. C. R. 98 A. C. J., wherein a widow in possession was awarded maintenance before being evicted at the suit of an heir to her deceased husband. See also *Vrandavandas v. Yamunabái*, 12 Bom. H. C. R. 229, wherein a concubine in possession was awarded maintenance under similar circumstances. See below "PARTITION BETWEEN BROTHERS," and *Dâyakrama-Sangraha*, Chap. VII. paras. 7-9; Stokes, H. L. B. 514.

in which she is entitled to the allotment of a son's share. (a)

The principle, limiting the participation of descendants from a common ancestor who live in union, is most explicitly stated in the *Vīramitrodaya*, f. 177, p. 1, l. 6 sqq. (b):—

*Kātyāyana*:—"Should one's own [brother] die before partition, his share shall be allotted to his son, provided he had received no livelihood from his grandfather. But that [grandson] shall receive his father's share from his uncle or from his [uncle's] son; but an equal share shall be allotted to each of the brothers according to law. Or his [the grandson's] son shall receive the share [in case his father be predeceased], beyond him [succession] stops."

*One's own (i.e.) brother. His son (i.e.) the brother's son. A livelihood (i.e.) a share. As it is necessary to know what kind of share he shall receive, (Kātyāyana) says, 'His father's share.' His son (i.e.) the great-grandson of the person whose estate is being divided, because the grandson has (already) been mentioned. Afterwards (i.e.) beyond the great-grandson, shall occur a stoppage; (i.e.) a stoppage of the succession. The meaning is that the great-grandson's son does not receive a share.*

Hence Devala also says:—"Amongst members of a family who reside together, being undivided or after having been divided, (on a

(a) The *Smpiti Chandrikā*, admitting that the widow has an interest in the property, but denying to her a share of it as *dāya*, says that, when sons make a partition, the mother becomes entitled for her maintenance to so much only as, with her other property, will equal a share. *Devāṇḍa Bhaṭṭa* however admits that, according to the *Mitāksharā*, the widow's share is heritage (*dāya*), though there be sons. See the *Smpiti Chandrikā*, Chap. IV. para. 8 ff. As to daughters, *ibid.* para. 18 ff. and Chap. IX. Sec. 3, para. 11; and as to the widow's lien on property given to her for maintenance, *ibid.* Chap. XI. Sec. 1, para. 44 ff. Succession of the widow and of the daughter, in the absence of sons, is recognised by this author as inheritance. See Chap. XI. Sec. 1, paras. 15, 22; Sec. 2, paras. 3, 7, 9; Sec. 4, para. 19. The widow of a re-united coparcener has an equal right with that enjoyed by her deceased husband, *ibid.* Chap. XII. para. 34.

(b) Transl. p. 72.

first or) second (partition), shares of the common property shall be given (even) to the fourth (in descent). That is certain." (a)

'The meaning is, a distribution of shares shall take place down to the fourth (descendant) from the common ancestor.'

'From the words "residing together," it follows that this rule holds good even for persons who have made a partition, and afterwards live together upon reunion or the like.'

With this doctrine the Madanaratna agrees; but the Mayūkha (b) contends, that the passages of Kātyāyana and Devala, quoted above, refer to reunited coparceners only. The Mayūkha's opinion is, however, based on a forced explanation of the term "avibhaktavibhakta" in Devala's passage. Nīlakanṭha takes it as a Karmadhārya compound, "those who were first undivided and became afterwards divided." The correct way to dissolve the compound is to take it as a 'Dvandva' or copulative compound. The correctness of the rule given above may be inferred also from the fact, that the great-great-grandson in the male line of a divided person inherits only as a Gotraja-relation, after the wife, daughters, &c. (c)

The distinction between the rights of male coparceners and of the female members of the family rests on this, that the rights of the former are immediate, arising on the birth of each, while those of the latter are contingent or dependent, having their source in the necessity for a provision for a marriage portion or maintenance. (d)

§ 3B. . A REUNITED FAMILY.—A reunited family may, according to the Mitāksharā, Chap. II. Sec. 9, para. 3, (e)

(a) See Colebrooke, Dig. Bk. V. Text 81; Manu IX. 210; Smṛiti Chandrikā, Chap. VIII. paras. 15, 16.

(b) Borradaile, Chap. IV. Sec. 4, paras. 22 and 23; Stokes, H. L. Books, 53-54.

(c) Vyav. May. Chap. IV. Sec. 4, p. 22; Borradaile 59; Stokes, H. L. B. 53.

(d) On this point, see the beginning of this Introduction, and below, § 7 A. 1 b.

(e) Stokes, H. L. B. 452.

consist (1) of a father and his sons, (2) of brothers, and (3) of nephews and paternal uncles, who, having once separated, have agreed to combine their interests again. According to the Mayūkha, Chap. IV. Sec. 9, para. 1, (a) all persons, who once formed a united family, may reunite. This difference of opinion depends on a variance in the interpretation of a passage of Brihaspati, quoted Mit. 1. c. para. 3. Vijñāneśvara takes it as an exhaustive enumeration of the persons capable of reunion, whilst Nilakanṭha views it as a *dikpradarśana*, i. e. an indication of principle, extending to analogous cases. (b)

It has been held by the High Court of Bombay that the reunion must be made by the parties or some of them, who once lived in union. (c) See to the same effect Jagannātha, in Colebrooke, Dig., Bk. V., T. 430.

## II. SEPARATION.

§ 4A. *Definition*.—Separation is the dissolution of the state of union or reunion, the continuance of which is based on the will or acquiescence of the united coparceners. (d)

§ 4B. *Separation, how effected*.—The separation of a family united or reunited may be effected :—

1. *By the will of all the members.*
2. *At the desire of one or more members only.*

(a) Stokes, H. L. B. 91.

(b) As to the effects of reunion see *Prankishen Paul Chowdry v. Mothooramchun Paul Chowdry*, 10 M. I. A. 403; *Rampershad Tewary v. Sheochurn Doss et al*, *ibid.* 506.

(c) *Vishwandth v. Krishnāji Ganesh et al*, 3 Bom. H. C. R. 69 A. C. J.

(d) According to the Malabar law descent is traced through females, and the joint property of the tarwād is impartible. The interest of an individual member endures only for his life and is not available for payment of his personal debts or taken in inheritance by his offspring. The group of common maternal origin take the acquisitions of such members collectively. See *Ponambilath v. Ponambilath*, I. L. R. 3 Mad. 169.

[3. *By the Judgment Creditor of a member or the purchaser at an execution sale of his interest.*]

*Times of Separation.*—1. Separation by the will of all the members, whether undivided or reunited, may take place at any time, provided there be no pregnant widow of a deceased coparcener. In that case it must be deferred until the delivery of the widow. (a) It cannot be prevented by third parties, however interested they may be in the estate, *e. g.* by creditors or mortgagees, since their equitable rights and remedies are not impaired. (*See below*, § 7 B. 1.)

2. As regards separation at the desire of one or several coparceners only, the head of a family, whether a father, grandfather, or great-grandfather may separate from his descendants at any time. (b)

A son living in union with his father, who is head of the family, may demand a separation and a division of the ancestral property at any time (c); of the

(a) May. Chap. IV. Sec. 4, para. 37, and compare para. 35; Stokes, H. L. B. 56-7.

(b) Mit. Chap. I. Sec. 2, paras. 2 and 7; Stokes, H. L. B. 377-8. *See also* May. Chap. IV. Sec. 4, para. 8; Stokes, H. L. B. 49-50.

(c) Mit. Chap. I. Sec. 5, paras. 5-8; Stokes, H. L. B. 392-3; May. Chap. IV. Sec. 4, para. 4; Stokes H. L. B. 48; Smṛiti Chandrikā, Chap. VIII. p. 20; *Nāglinga Mudali v. Subbiramniya Mudali et al*, 1 M. H. C. R. 77; *Kali Pershad v. Ram Charan*, 1 L. R. 1 All. 159; *Phulchand v. Man Singh*, 1 L. R. 4 All. at p. 312. The late Supreme Court held that a son could not enforce a partition of ancestral moveable property, *Lakshman Dada Naik v. Ramachandra Dada Naik*, 1 Bom. H. C. R. 76 App., 1 L. R. 1 Bom. 563. *See however*, Mit. Chap. I. Sec. 5, pl. 3; Stokes, H. L. B. 391; and Coleb. Dig. Bk. V. T. 92, whence it appears that according to the law-books the ancestral wealth (*dravya*) generally is subject to partition at the will of the son, though particular parts of it, as jewels, may be excepted. *See also* Coleb. Dig. Bk. V. T. 26, Comm.; *Rājā Rām Tewary et al v. Luchmun Pershad et al*, 8 C. W. R. 15 C. R.; *Laljeet Singh v. Rajcoomar Singh*, 12 B. L. R. 373; *Suraj Bunses Koor v. Sheo Proshad Singh*, L. R. 6 I. A. at p. 100, and the cases therein cited;



self-acquired property, under certain conditions only, (a) viz :—

a. If the father be indifferent to wealth, his wife past child-bearing, and the daughters married. (b)

b. If the father be incapacitated by bodily ailments, extreme age, insanity, or by addiction to vice, (c) or loss of caste. The last of these conditions would, however, now perhaps be inoperative, as loss of caste, according to Act XXI. of 1850, does not affect a man's civil rights. (d) A grandson, living in union with his grandfather, or a great-grandson with his great-grandfather, may similarly demand a partition, provided his own father, or his father and grandfather, be dead. Till then he cannot demand a partition notwithstanding his right in the property, because the

above, p. 170, Section 8, ON THE LIMITATIONS OF PROPERTY. Mr. Ellis, at 2 Str. H. L. 321, adopting the Bengal Law that the father is not bound to divide, adds that he must maintain his son. At 2 Str. H. L. 323, Mr. Sutherland has overlooked Mit. Chap. I. Sec. 5, p. 8. (Stokes, H. L. B. 393.)

(a) 2 Str. H. L. 320.

(b) The doctrine, given here, is that of the *Mitāksharā* as explained by the *Subodhini* (Coleb. Mit. Chap. I. Sec. 2, note to para. 7; Stokes, H. L. B. 378). The *Viramitrodaya* differs from this view by rejecting the division *a*, while the *Mayūkha* Chap. IV. Sec. 4, para. 3, Stokes, H. L. B. 48, divides *a* into two sub-divisions. *Nārada*, Pt. II. Chap. XIII. Sl. 2 ss, gives the following times, (1) after father's death, (2) when the father being old desires, (3) when the mother is past child-bearing, and the sisters married, (4) when the father's capacity or desire has ceased.

(c) The *Mitāksharā* says, 'if he is addicted to vice.' The *Viramitrodaya* explains this to mean 'loss of caste.' But it is probable that the Mit. means to include, besides loss of caste, the case of a notorious spendthrift and evil liver, as 'interdiction' is otherwise known to the Hindū Law. See above, pp. 194, 639; Mit. Vyav. Chap. I. Sec. 5, pl. 9; Stokes, H. L. B. 393. If a father has become incapacitated, or retired from worldly affairs, a son may become the representative of the family, 2 Str. H. L. 326; Steele, L. C. 178.

(d) *Tagore v. Tagore*, L. R. Suppl. I. App. p. 56.

intervening heir obstructs his complete title, (a) that is, intervenes between him and the full acquisition of it.

A son, a grandson, or a great-grandson may voluntarily separate, without receiving a full share, at any time. (b)

The law of the Mitāksharā thus stated must be regarded as binding generally in Bombay as in the other provinces in which the authority of that work prevails. But it is subject to many exceptions according to the caste law of the parties. Thus amongst 82 of the 101 castes, from whom information was obtained by Mr. Steele at Poona, it was found that partition could not be enforced by a son against his father unless the father had acted improperly as manager. (c) It would seem therefore that in the usage of a large minority, at least of the people of the Dekhan, the rule of Baudhāyana (d) is still received as law. "While the father lives the division of the estate takes place (only) with his permission." In Gujarāth the castes, almost without exception or qualification, answered Mr. Borradaile's inquiries by denying the right to partition of a son against the wish of his father. Although the Śāstris therefore, as in Chap. I. Sec. 1, Q. 3, 6, below, generally follow the Mitāksharā in recognizing a son's right to enforce partition, there is room for reasonable doubt as to whether it can be considered as finally established except amongst those castes or classes whose rights and duties in this particular have become the subject of judicial decision. Uniformity of the law is so desirable that the Courts will naturally desire to abide by the Mitāksharā and the Mayūkha, (e) whose doctrine has been

(a) Mit. Chap. I. Sec. 2, paras. 1 and 7; Stokes, H. L. B. 377-8; Sec. 5, para. 3, note, *ibid.* 391; May. Chap. IV. Sec. 4, paras. 1-3, *ibid.* 47-48.

(b) Mit. Chap. I. Sec. 2, paras. 11 and 12, *ibid.* 380; May. Chap. IV. Sec. 4, para. 16, *ibid.* 51.

(c) Steele, L. C. 216; *see ib.* pp. 405, 407.

(d) Transl. p. 224.

(e) *See* Bk. II. Chap. I. Sec. 1, Q. 1.

adopted by the Judicial Committee (a) but it is only fair to point out that custom does not appear to have more than partially accepted these authorities on the point now in question. On the one side are the Śāstris whose opinions are entitled to respect; but on the other are the answers given by the representatives of the castes themselves. Even amongst the Brāhmans the son's right does not seem to be fully admitted by any of the classes whose answers are preserved in Mr. Borradaile's collection; while amongst the lower castes the answers, without exception, so far as has been discovered, were either that the son could not enforce partition at all, or else that the father could retain so much as he wished of the ancestral property. (b) This would of course reduce the son's right to nothing. (c) In several cases the surviving mother's assent is said to be necessary to validate a partition after the father's death, and in nearly all it is set forth as a condition that she is to be provided for. (d)

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(a) See *Suraj Bunssee Koer's* case, L. R. 6 I. A. at p. 100.

(b) So in *Steele*, L. C. 405, 407 ss.

(c) Amongst the Oudich Brāhmans of Broach and the neighbourhood it was said that there was no instance of sons having made a partition during their father's life. The father dividing the property might retain as much as he wished for himself during his life, subject to the rights of his sons at his death; *Borr. Lith.* p. 59.

(d) This is in accordance with a tendency in many castes to favour the mother in the matter of succession. See above, pp. 99, 157, and Bk. I. Chap. II. Sec. 6A, Q. 19, 21, 23, 24, 26.

The (Bhargova Visa) Brāhmans of Surat said: "So long as the father lives his sons are not competent, without his consent, to divide the father's or grandfather's property." (*Borr. Lith.* p. 85.) So also those of Broach. (*Ib.* p. 127.) A similar rule was stated by the Srimāli Brāhmans of Surat and of the neighbourhood of Broach. (*Ib.* pp. 151, 182.) The Mewāra Chowraisi Brāhmans recognized a partition at the father's option during his life; but no instance had occurred of one against his will (*Ib.* p. 211) at Surat. At Broach no partition is allowed without his consent (*Ib.* p. 227.) The

A member cannot enforce a partial division (a). As to this, however, Sir R. Couch, C. J., in *Shib Suhaye Singh et al v. Nursing Lall et al* (b) says, "I did not intend to decide any such general question." But this is the recognised law

Mewāra Bhuttee Tulubda Brāhmans of Surat allow no partition without the father's assent in his life either of his property or of the grandfather's. (*Ib.* p. 244.) He may divide and then the sons during his life take what he has assigned to each. So amongst the Sachoura, and Waira, and Oonewal Brāhmans of Surat. (*Ib.* pp. 298, 319, 342.) The Brāhmans (Motola, Desae Tur) of Olpar stated a similar rule (*Ib.* p. 267) as prevailing amongst them. At Broach amongst the Oonewal Brāhmans should a son separate himself the father sets apart a share for him. (*Ib.* p. 363.) Amongst the castes below the Brāhmans, the assent of the father is set forth as indispensable amongst the following :—

Borr. Col. MS.

Book G, p.	29	Bhaosar Cheepa Sooruti.....	Surat.
	76	Do. Shravak (Tuppa Sect.)...	Do.
	135	Sootar Punchallee Sooruti ...	Do.
	200	Do. Goojar Tulubda Sooruti..	Do.
	252	Do. Purdaisee Khatee .....	Do.
	296	Lohar .....	Ahmedabad.
	335-6	Sootar Lohar Sooruthiya .....	Surat.
	362	Khatree Vunkur Sooruti.....	Do.
	410	Durjee Meeraee do. ....	Do.
	445	Malee Sonathiya do. ....	Do.
	475	Do. Moghreliya do. ....	Do.
	510	Kudiya do. ....	Do.
	541	Pukhalee do. ....	Do.
	568	Vansphora do. ....	Do.
	591	Do. Dukhani do. ....	Do.

(Continued next page.)

(a) *Nāndbhai v. Nāthābhai*, 7 Bom. H. C. R. 47, A. C. J. For the Bengal law, see the note of Sir W. Jones at 2 Str. H. L. 251. He thinks that the text of Manu IX. 104, "After the death of the parents &c." prevents a partition, even after the father's death, except with the mother's assent. See above, Sec. 3 A, and the case of *Lakshman v. Satyabhamābai*, I. L. R. 2 Bom. 494.

(b) 22 C. W. R. 354.

in Bombay, (a) and in the North-West Provinces. (b) The same rule holds good in respect to one or more members of

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Borr. Col. MS.

Book G. p. 609	Koombhar Goojurathi Sooruti ...	Surat.
636	Dhobee Rawatiya do. ....	Do.
699	Waghrees .....	Do.
719	Duphgur Rajpoot .....	...
745	Khalpa Puttuni .....	Surat.
773	Do. Khumbarti Sooruti .....	Do.
Book C. D. E, p. 16	Bruhm Kshatrees, &c. ....	Broach.
39	Kayusthus Valnik .....	Surat.
57	Do. Mathur .....	Do.
73	Sonee Dumuniya .....	Do.
89	Do. Tragun Javeeya .....	Do.
110	Lohar Bhownugguriya .....	Do.
128	Bharboonja Kayustha .....	Do.
144	Rajpoot Jadhovvanshi .....	Sabulgaon.
157	Purdese Aliya.....	Surat.
174	Salvee Sreemalee Veesa... ..	Do.
192	Koombhar Lar Sooruti ... ..	Do.
210	Sulat Sompooora do. ....	Do.
229	Mochee Kudiya Khumbarti .....	Do.
245	Bhurwar.....	Do.
Book F., p. 28	Hujjam Mehsooriya.....	Do.
59	Soothar Vaisya.....	Do.
120	Hujjam Kalsooniya .....	Do.
165	Khutree Phurusrami .....	Broach.
201	Dher Tulubda .....	Surat.
229	Soothar Puncholee .....	Broach.
259	Bráhmans Kherwa Hoomunero...	Gour.

In no instance is there an admission of an unqualified right on the part of a son to enforce a partition and obtain a share.

The instances above tabulated are all drawn from the districts of Surat and Broach. The collection for Ahmedabad was not completed, or it has been lost.

(a) *Trimbak Dixit v. Náráyan Dixit*, 11 Bom. H. C. R. 69; *Venkatesh et al v. Ganapaya*, R. A. Nos. 30 and 31 of 1875, Bom. H. C. P. J. F. for 1876, p. 110.

(b) *Mithoo Lall v. Golam Nuseer-ood-deen et al*, 4 Agra Rep. 276.

a family, consisting of brothers or collaterals only, (a) the whole property being brought into account, (b) so far as it is common. (c) The right to claim a partition is not lost by its non-exercise during six or seven generations. (d) A decree for partition produces an immediate severance of interests, subject however to the result of an appeal should one be made. An appeal seems to suspend or postpone the division until it is decided, according to the cases quoted below, Sec. 4 D. (e)

3. *Partition in Execution of Decrees*.—The creditor of an undivided coparcener may obtain execution of his decree against the share of his judgment debtor by enforcing a partition. (f) This is closely connected with the law now recognized in Bombay and Madras, that a parcener may

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(a) *Mit. Chap. I. Sec. 3, para. 1; Musst. Deowanti Koonwar v. Dwarkanath*, 8 B. L. R. at p. 363, note; 2 Str. H. L. 358.

(b) *Lakshman D. Naik v. Ramchandra D. Naik*, I. L. R. 1 Bom. 561. See below, Sec. 7.

(c) *Moti Mulji v. Jamnadas Mulji*, S. A. No. 77 of 1877, Bom. H. C. P. J. F. for 1877, p. 123; *Ballal Krishna v. Govinda et al.*, S. A. No. 25 of 1877; *ibid.*, p. 124.

(d) *Thakur Durriao Singh v. Thakur Davi Singh*, L. R. 1 I. A. 1; *Moro Vishvanath v. Gunesh*, 10 Bom. H. C. R. 444. As to limitation, see above, p. 633, and below, Sec. 4 D.

(e) The right acquired by a decree may be abandoned by non-execution, *Prankissen Mitter v. Sreemutty Ramsoondry Dossee*, 1 Fult. 110. This might be regarded as a case of reunion as soon as limitation barred execution of the decree.

(f) The whole property of two co-sharers may be attached for the debt of one, though only the undivided moiety can be sold, *Goma Mahadev v. Gokaldas Khimji*, I. L. R. 3 Bom. 74. By proceedings in execution against a single parcener (even the father) alone, his interest only, not that of his sons, can be affected according to *Deendyal Lal v. Jugdeep Narain Singh*, L. R. 4 I. A. 247. (See on this subject above, pp. 621 ss.) Separation may be enforced in order to give effect out of his own share to a sale made by a single member of a joint family, 2 Str. H. L. 349, or to a sale of such share in execution, *Bai Suraj v. Desai Harlochandras*, Bom. H. C. P. J. F. for 1881, p. 123, and *Gopal Narayan v. Atmaram Ganesh*, Bom.

dispose effectually of his own undivided share for value, though not by way of gift or devise, except for pious purposes. (a) It is improper to put a purchaser of land in execution of a decree against one member of an undivided family into possession of the property. (b) Where he has been actually placed in possession, the other co-sharers will be awarded joint possession and the parties will be left to work out their several rights should they desire it by a suit for partition. (c) The alienation is thus subject to claims

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H. C. P. J. F. for 1879, p. 489. Such a transaction, however, Ellis says, *Str. H. L. loc. cit.*, is presumably collusive on the part of the purchaser. See below, Sec. 4 F.; *Suraj Bunsî Koer v. Sheo Purshad Singh*, L. R. 6 I. A. at p. 109; 4 Comyn's Dig. 233.

A judgment debtor and his sons having joint possession of family property, the latter can sue for a declaration of their title to two-thirds of the property, whilst under attachment under decree of a creditor as against the former, without asking for consequential relief, *Narayan Damodar v. Balkrishna Mahadev*, I. L. R. 4 Bom. 529.

(a) See the elaborate judgment of Sir M. Westropp, C. J., in *Vásudev Bhat v. Venkatesh Sanbhav*, 10 Bom. H. C. R. 139; *Udárám Sitáram v. Ránu Pánduji et al*, 11 *ibid.* 76; *Mahábaláyá v. Timáyá*, 12 *ibid.* 138, &c., referred to below; *Tukaram v. Ramchandra*, 6 *ibid.* 247, A. C. J.; *Suraj Bunsî Kooer v. Sheo Prashad Singh*, L. R. 6 I. A. 88, 101; *Anant Balaji v. Ganesh Janardhan*, I. L. R. 5 Bom. 499, which discusses *Pandurang Anandav v. Bhasker Sadashev*, 11 Bom. R. 72, 76; *Mahábaláyá v. Timáyá*, 12 Bom. R. 138; *Dugappu Sheti v. Venkatramnaya*, I. L. R. 5 Bom. 493, 496; *Kalappa v. Venkatesh* I. L. R. 2 Bom. 676, citing *Nowla Ooma v. Bala Dhurmaji*, *ibid.* 95; *Gopal Narayan v. Atmaram Ganesh*, H. C. Bom. P. J. F. for 1879, p. 489; see above, pp. 605 ss.

The share of a widow arising on partition cannot be defeated either by execution proceedings or by a voluntary partition, *Bilass v. Dinanath*, I. L. R. 3 All. p. 88. Comp. *Parwati v. Kísansing*, I. L. R. 6 Bom. 567.

(b) *Deendyal Lal v. Jugdeep Narain Singh*, L. R. 4 I. A. at pp. 251, 252, 255; *Anant Báláji v. Ganesh Janardhan*, I. L. R. 5 Bom. 499, which discusses the previous cases, and pp. 607, 621, *supra*.

(c) *Mahábaláyá v. Timáyá*, 12 Bom. H. C. R. 138; above, p. 633.

of the other sharers on the common property. (a) What is sold for the necessary discharge of a common liability is deducted from the common estate. (b)

§ 4 c. *Right to partition limited to demandant and his share.*

1. It must be considered a fundamental principle, that each coparcener has power only to effect his own separation from the family, and not to enforce a separation amongst the other coparceners against their will. In the *Mitāksharā* Chap. I. Sec. 2, para. 1 (c) it is stated, that "When a father wishes to make a partition, he may at his pleasure separate his children from himself, whether one, two, or more sons," and the comment on this by *Bālabhāṭṭa*, as translated in the note, is, that he may "make them distinct and several by giving to them shares of the inheritance." From this it would at first sight appear, that a father has a right not only to sever himself in interest from his sons, but also to effect a separation amongst the sons, independently of their desire or assent. (d) This however would not be a correct inference; the entire comment of *Bālabhāṭṭa* runs thus:—

'(If) he make them distinct by giving to them shares of the inheritance. As the limit of this (separation) is desired to be known, he (*Vijñāneśvara*) adds: "From himself."

'The purport is, that the (author) does not stop to consider, whether they (the sons) remain afterwards united or separate.'

This is evidently not conclusive either of separation or of union in such a case.

It is, no doubt, competent to a father to distribute, to a certain extent, his self-acquired property at his own pleasure

(a) *Muccandas v. Ganpatrao*, Perry's O. Ca. 143.

(b) *Narayan Vinayak v. Balkrishna Narayan*, Mis. S. A. No. 21 of 1872, Bom. H. C. P. J. F. for 1872, No. 190.

(c) *Stokes*, H. L. B. 377.

(d) This would be the most natural inference from *Nārada* also. See *Nārada*, Pt. II. Chap. XIII. sl. 4.



amongst his sons. (a) But it does not follow, that by such a distribution, a separation amongst them individually and independently of their own desire will be effected. There appear to be no texts, which lay down such a rule, and Jagannâtha, in Colebrooke's Digest, Book V. Chap. VIII. Text 430, explicitly recognises the doctrine of a continuance of union in a family, notwithstanding the separation of individual members and the allocation to them of their shares in the estate. (b) He makes separation or non-separation depend on the free consent of the coparceners, resting, in the absence of explicit texts, on the reason of the law—a principle recognized in the Hindû, as well as in the English jurisprudence (c). So too the Privy Council (d) say, "It is however clear upon the evidence that the two other brothers continued joint after the separation of Shama Doss." (e)

This principle has been questioned in Madras, where the right to sever the sons *inter se* seems to have been regarded as a part of the *patria potestas* still recognized by the Hindû law, (f) and in *Lakshmibâi v. Ganpat*

(a) Below, Sec. 7 A, 1 a (2), and Chap. I. Sec. 1, Q. 4, Rem.; Steele, L. C. 58, 216, 220.

(b) So Steele, L. C. p. 214.

(c) Colebrooke, Dig. Bk. II. Chap. IV. Text 17. The defendants in a suit for partition in England need not submit to it *inter se*. The partition may be limited to the share of the plaintiff. *Hobson v. Sherwood*, 4 Bea. 184, and a conveyance by a single joint tenant severs only his share, Co. Lit. 394.

(d) In *Musst. Cheetha v. Baboo Miheen Lall*, at 11 M. I. A. 360.

(e) See also *Rewan Persad v. Musst. Râdhâ Beeby*, 4 *ibid.* 137.

(f) *Kandasami v. Doraisami Ayyar*, I. L. R. 2 Mad. 317. The learned judgment sounds almost like an echo from an earlier world, one in which the equal rights of sons with the father had not yet been developed. (See Nârada, XIII, 15; Âpast. II, VI, 14.) The power ascribed is special to the father, and would be exercised in vain against the will of sons who, being severed by the father's will, might forthwith reunite by their own. The cases of infants and absentees

*Morobá* (a) it was laid down, that a grandfather could, by a will distributing a share of ancestral property received by him on a partition in equal portions among his grandsons, effect a separation amongst the latter. (b)

are distinct. See below. In the Punjab the division made by a father may be revised at his death, see Panj. Cust. Law, II. p. 169, 180, 206, 257. A similar case in the Dekhan, Steele, L. C. p. 219.

(a) 5 Bom. H. C. R. O. C. J. 128.

(b) As to Wills, see above, pp. 213 ss.

A daughter (childless) may dispose by will of property inherited from her father as against his heirs or her own, *Haribhat v. Damodhar-bhat*, I. L. R. 3 Bom. 171, quoting *Narotum v. Narsandas*, the note at 5 Bom. R. 136, O. C. J., and *Bluka v. Bhava*, 9 Harr. R. 449.

Mr. Ellis thought that a Hindû could not make a will at all, 2 Str. H. L. 419. It is obviously opposed to the Brâhmanical family system and to the interest of the ancestral manes in the estate out of which sacrifices to them are to be provided. A general opinion unfavourable to the testamentary power was expressed by native judicial officers consulted in Bombay in 1864. But the principle obtained early recognition, though but a qualified one, that what could be given away during life could be bequeathed by will. See *Doe dem Munnoo Lall v. Goper Dutt*, (A. D. 1786), Mort. R. 81; *M. V. Vardiah v. M. Lutchumia* (A. D. 1824), M. S. D. A. Dec. 438. In Madras, wills of Hindûs have long been recognised by Statute if made in conformity with Hindû Law, Reg. III. of 1802, Sec. 16, and Reg. V. of 1829, Sec. 4, but this condition left the whole question of testamentary competence open, as may be seen by a reference to the Madras decisions.

In Bombay separate and self-acquired property may be thus dealt with, *Nana Narain Rao v. Haree Punt Bhao et al*, 9 M. I. A. 96, 98; *Baboo Beer Pertab Sahoe v. M. Rajender Pertab Sahoe*, 12 M. I. A. at p. 38; *Adjoodhia Gir et al v. Kashi Gir et al*, 4 N. W. P. H. C. R. 31; *Bhagvan Dullabh v. Kalla Shankar*, I. L. R. 1 Bom. 641. The extent of the testamentary power must be regulated by the Hindû Law, *Sonaten Bysack v. S. Juggutsoondree Dossee*, 8 M. I. A. at p. 85 (which furnishes no analogy but that of gifts); Colebrooke at 2 Str. H. L. 428, 431, 435; *Jotindra Mohan Tagore v. Ganendra Mohan Tagore*, S. I. A. 47 S. C. 9 Beng. L. R. at p. 398. But see also *S. Soorjeemoney Dossee v. Denobundoo Mullick et al*, 9 M. I. A. 123. Thus a will cannot be made of ancestral property in which sons have an interest, though effect may be given to it as a family arrangement, *Lakshmi-*

The reasoning of the learned Judge in that case

*bai v. Gunpat Moroba et al*, 5 Bom. H. C. R. 135 O. C. J.; 2 Str. H. L. 436. The castes reject the wills of testators having issue, *Borr. Coll. passim*.

That a Hindû's will is to be construed according to Hindû Law, see *S. Soorjeemoney Dossee v. Denobundoo Mullick*, 6 M. I. A. at p. 550; *Musst. Kollaney Kooer v. Luchmee Pershad*, 24 C. W. R. 395; *Jotindra Mohan Tagore v. Ganendra Mohan Tagore*, S. I. A. 47: S. C., 9 Beng. L. R. 395; *Molvi Mahomed Shumsool Rooder et al v. Shewukram*, 14 Beng. L. R. 227, 230, S. C., L. R. 2 I. A. 7; *Musst. Bhagbutti Dace v. Chowdry Bholanath Thakoor et al*, L. R. 2 I. A. 256, 261; *Ramguttee Acharjee v. Kristo Soondraes Debia*, 20 C. W. R. 473, C. R. As to the form, a nuncupative will is effectual, *Bhagvan Dullabh v. Kala Shankar*, I. L. R. 1 Bom. 641; and so is a parol revocation, *Maharaj Pertab Narain Sing v. Maharanee Soobha Kooer et al*, L. R. 4 I. A. 228.

In East's cases No. 75 is a case of an adoption by a prostitute of a girl. It was said after adoption the son's share could not be devised, see *Morl. Dig.* 133.

The following cases and observations on the law of wills may be added to the brief discussion of the subject in Bk. I. Sec. 9, and in the note above. An attempt to create a perpetuity will not be supported, *Muccondas v. Ganputrao* in *Perry's Or. cases*; above, pp. 178, 195, 196. See *Abdul Ganee Kâsam v. Hasan Meysa Rahimtulla*, 10 Bom. H. C. R. at p. 10.

A charge on property for worship will not give effect to an attempt to create a perpetuity in the surplus proceeds, *Ashutosh Dutt v. Doorga Churn Chatterjee*, L. R. 6 I. A. 182; above, p. 178, 182, 184; *Promotho Dossee v. Radika Persaud Dutt*, 14 Beng. L. R. 175.

A bequest for the erection of a bathing ghat and temples at the discretion of the executor, who renounced, was declared void for uncertainty, *Surbo Mungola Dabee v. Mohendronath*, I. L. R. 4 Calc. 508. It may perhaps be doubted whether effect should not have been given to this bequest according to the Hindû Law; see above, pp. 229, 230; *Steele*, L. C. 214, 404, 405.

Section 234 of the Indian Succession Act, X. of 1865, applies to Hindûs, and an application may be made under it to revoke the probate of a Hindu's will. In *re Pitamber Girdhar*, I. L. R. 5 Bom. 638.

By the Hindû Wills Act, XXI. of 1870, the forms prescribed by Sec. 50 of the Succession Act, X. of 1865, must be followed by Hindû testators where the Act is in force, *i. e.* Lower Bengal and the towns of Madras and Bombay. The Hindû Wills Act was not intended to introduce changes in the substantive Hindû law. The introduction

was not, however, concurred in by the Court on

of Secs. 98, 99, 101 of the Succession Act is subject to all the provisos in Sec. 3 of the Hindû Wills Act, which was not intended to enlarge a testator's power, only to regulate its exercise, *Alangmanjari Dabee v. Sonamonee Dabee*, I. L. R. 8 Calc. 637.

A person claiming under a will in the Mofussil is not generally obliged to obtain probate. See above, p. 226. Act V. of 1881 however, by Sec. 4, makes the executor or administrator of the deceased his legal representative, and vests the property in him. By Sec. 2 of the same Act, Chaps. II. to XIII. thereof apply in the case of "every Hindû, Buddhist and person exempted under Sec. 332 of the Indian Succession Act, 1865, dying before, on or after 1st April 1881." Again it is provided "that except in cases to which the Hindû Wills Act, XXI. of 1870, applies, no Court in any local area (in the Mofussil).....shall receive applications for probate or letters of administration until the local Government has, with the previous sanction of the Governor General in Council, by a notification in the Official Gazette authorized it so to do." The High Courts are, as to such areas, similarly restricted. Now Act XXI. of 1870 in a sense applies to all wills made by Hindus, &c., in the towns of Bombay and Madras, but it does not apply to those made in the Mofussil, except so far as they relate to immoveable property within the presidency towns. The result seems to be that until the issue of the requisite Notifications the law in the Mofussil remains what it was, while in the Presidency towns the new legislation applies to the estates of all classes of natives. When the Notification has been issued in Bengal the whole Act will operate generally there along with Act XXI. of 1870, but in Bombay and Madras the Act of 1870 is limited to the Presidency towns. In those towns therefore the provisions of the two Acts will operate together, while in the Provinces Act V. of 1881 will operate alone from the 1st April 1881 conditionally on the notification required by Sec. 2 having been made. The provisions of Sec. 52 of Act V. of 1881 are repeated *verbatim* in Act VI. of 1881, Sec. 2, as an addition (Sec. 235 A) to Act X. of 1865, and other provisions are made with regard to "District Delegates." The tangle, here, of exemptions, exceptions, provisos and conditions is such as will afford a useful exercise to the perspicacity of students of the law. As to testators, the words of H. H. Wilson (Works, V. 58) may be quoted: "If the Hindûs are to be authorized to make wills, they should be instructed how to make them and not be suffered to.....make the arrangements which they contemplate subject to improbable or impracticable conditions."

appeal, and the ultimate decision was based on different

As to the construction of Hindûs' wills, *see above*, pp. 184, 224, 229, 668. Such words as "putra paotrâdi krâme" and "naslan bād naslan," though primarily importing the male sex yet included females as heirs to either males or females, *Ram Lal Mookerjee v. Secretary of State for India*, L. R. 8 I. A. 46.

The usual notions and wishes of Hindûs with regard to the devolution of property may properly be taken into consideration, *Moulvie Mahomed v. Shevukram*, I. R. 2 I. A. 7. Compare *Maniklâl Atmardm v. Manchershî Dinsha*, I. L. R. 1 Bom. 239; *see above* pp. 183, 184, 205.

A bequest to a class not completely ascertained and existing at the testator's death fails as to those even who do exist, according to *Soudamoney Dossee v. Jogesh Chunder Dutt*, I. L. R. 2 Calc. 262; *Kherodemoney Dossee v. Dhoorgamoney Dossee*, I. L. R. 4 Calc. 455. The provisions of Secs. 102 and 103 of the Indian Succession Act, X. of 1865, do not apply to the Mofussil, but do apply to the town of Bombay under Act XXI. of 1870. The references to the Hindû law in the latter of the two cases just cited seem to show that those qualified at the testator's death might take, but the decisions point the other way. Comp. pp. 183 ss.

According to the English Statute, 3 and 4 Wm. IV. C. 106, an heir who is also a devisee takes in the latter character.

The present freedom of devise in England is of quite recent origin. Before the Conquest a man might dispose as he pleased of his own acquisitions, though his devise of book-land was usually precatory on account of the temporary character of his interest as strictly viewed. After the Conquest "till modern times a man could only dispose of one-third of his moveables from his wife and children, and in general no will was permitted of lands till the reign of Henry the Eighth, and then only for a certain portion; for it was not till after the Restoration that the power of devising real property became so universal as at present," Kerr's *Blackstone*, II. p. 11. The Latin nations adopted the Roman Law system of testaments much more readily; the older German Law, as reported by Tacitus, was simply *Heredes successorisque sui cuique liberi et nullum testamentum*. The customary equal partition of lands under the law of gavelkind seems to have been limited to the undivided estate, and over this by the old Common Law a father had not a power of free devise, which indeed is manifestly opposed to rights of equal partition. *See for the Saxon Law*, Elton, *Tenures of Kent*, 74; and comp. *infra*, Bk. II. Chap. I. Sec. 2, Q. 4. The custom of the City of London down to 1725 allowed a freeman to deal by way of devise

grounds. (a) The views above stated are conformable to those set forth by Sir T. Strange, H. L. 193 and 204, the authority quoted by whom, however, is not applicable. In a Bengal case effect was refused to a father's deed of partition which had not been carried out by actual distribution in his life. (b) Conversely when a testator had bequeathed his business to his sons, but had directed that there should be no partition for 20 years, the latter direction was held repugnant, and the sons entitled to immediate partition. (c)

with only the half or one-third equal to the half or one-third which it gave to his widow and to his children even of his personal property, Vin. Abt. Customs of London. Thus the notions of the Hindus were substantially those of the English until a comparatively recent time.

(a) See *Lakshmidā v. Ganpat Moroba*, 5 Bom. H. C. R. 128 O. C. J.

(b) *Bhowannychurn v. Heirs of Ramkaunt*, 2 C. S. D. A. R. 202. This case may be referred to another principle, see below, Sec. 4 d, but it shows that the mere volition of the father was not held by itself to create the desired jural relations.

(c) *Mokoondo Lall v. Gonesh Chunder*, I. L. R. 1 Calc. 104. His inculcation of joint enjoyment is no bar to a suit for partition, *Raja Sooranany Venkatapettyrao v. R. S. Ramchandra*, 1 M. S. D. A. Dec. 495. So Macn., Cons. on H. L. 323; see above, pp. 178, 182, 195.

The Madras High Court allows a gift but not a bequest by an undivided coparcener, *Vitta Buttel v. Yamenamma*, 8 Mad. H. C. R. 6. The latter it thinks prevented by the survivorship. This principle was recognized by the Privy Council in *Suraj Bansi Koer v. Shivparsad Singh*, L. R. 6 I. A. 88. In Bombay the gift of undivided property by a joint coparcener is illegal, see Privy Council in *Lakshman Dada Naik v. Ramchunder*, L. R. 7 I. A. 181. A father in an undivided family cannot dispose by will of his undivided share without the consent of his co-sharers, *ib.* The alienation by gift where, as in Madras, that is admitted, is founded on a parcener's right to partition and dies with him, the title of the other co-sharers vesting by survivorship at the moment of his death. The Śāstris denied any power of disposal before partition in *Bajee Sudshet v. Pandoorung*, 2 Morr. 93. According to these cases the father's declaration of will would be inoperative, except after partition or to effect it in his own case.

A joint tenant under the English Law has not a devisable interest, Co. Lit. 185 b.

§ 4 c. 2. *Great-grandson*.—Devala says, “Partition among undivided parceners and among reunited parceners extends to the fourth in descent from a common ancestor.” The case of a great-grandson is not otherwise expressly dealt with in the Hindû law books except in a rather obscure passage of Kâtyâyana quoted by the *Vîramitrodaya*, (a) but it rests on the same principle as that of the grandson, viz., on the doctrine of representation. (b)

§ 4 c. 3. *Minors*.—In the case of minor coparceners, it would certainly tend to convenience, if the doctrine, apparently upheld by the Madras and Bombay High Courts, (c) that a minor coparcener is to be represented in partition by his guardian, could be based on any explicit texts. All, how-

(a) Transl. p. 72.

(b) “The great-grandson’s son is not entitled to any share.” *Vîram. loc. cit.*

(c) *Nallappa Reddi v. Balammdl et al*, 2 Mad. H. C. R. 182, quoted in *Lakshmibai v. Gunpat Moroba et al*, 5 Bom. H. C. R. O. C. J. p. 128. Every minor is to be guarded by the King, Coleb. Dig. Bk. V. T. 449; 2 Str. H. L. 72.

Minority now ceases at 18 years of age, Act. IX. of 1875.

A guardian may sell a portion of a minor’s property to maintain a suit beneficial to the minor, *Ganga Prasad et al v. Phool Singh et al*, 10 C. W. R. 106. Compare the cases of *Lalla Bunseedhur v. Koonwar Bindeseree Dutt Singh*, 10 M. I. A. 454, and *Dharmâji Vâman et al v. Gurrâv Shrinivâs et al*, 10 Bom. H. C. R. 311; *Taikom Derji v. Aba*, Beng. H. C. P. J. 1878, p. 126. The minor is bound by a compromise made in good faith, *Baboo Lekraj v. Baboo Mahtab Chand*, 14 M. I. A. 393.

When an administrator has not been appointed under Act XX. of 1864 a guardian *ad litem* of a minor may be appointed under Section 443 of the Code of Civil Procedure, Act XIV. of 1882, *Jadow Mulji v. Chhagan Raichand*, I. L. R. 5 Bom. 306. The office of administrator or of guardian *ad litem* cannot be imposed on a person unwilling to accept it, *Bâbâji bin Kusâji v. Maruti*, 11 Bom. H. C. R. 182 S. C., I. L. R. 5 Bom. 310. An officer of the Court may be appointed guardian, and being appointed remains subject to the jurisdiction, see Act XV. of 1880, Sec. 3, cl. (b).

The Minors’ Act for the Bombay Presidency is Act XX. of 1864. But this, it has been held, does not enable the Civil Court under

ever, that can be deduced from the original authorities appears to be that the interests of the minor shall be duly regarded, and shall, if necessary, be protected by the sovereign power. His position is, in fact, declared to be analogous to that of absentees, and the rules proceed on the assumption that his assent or that of a guardian for him is not essential. (a) The minor must not be injured by any unconscientious dealing. Mr. Colebrooke, in an opinion quoted at 2 Str. H. L. 360, says, that "the sovereign or his representative, as *guardian of the minor*, is competent to authorise a partition," and for this opinion he refers to a text of Kātyāyana, Coleb. Dig., Bk. V. Chap. VIII., T. 453. But this text points to the necessity of protecting the minor's interest, if, contrary to the ethical obligation to remain undivided during the minority, (b) a partition should actually be made by the adult coparceners, rather than to any necessity for an assent expressed on behalf of the minor. (c) This text, indeed, and

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ordinary circumstances to take charge of an infant's share in undivided property, *Shivji Hasam et al v. Datu Marji*, 12 Bom. H. G. R. 281. So under Act XL. of 1858, *Sheo Nundun Singh v. Musst. Ghunsam Kooeree*, 21 C. W. R. 144. A different view however seems to have been taken by the Judicial Committee in *Doorga Persad v. Baboo Keshav Persad*, I. L. R. 8 Cal. 656. See below, p. 674, note (e). +

The natural father is not the proper guardian of an adopted infant so long as either of his adoptive parents lives, *Lakshimbai v. Shridhar Vasudeo Takle*, I. L. R. 3 Bom. 1. The Bombay Minors' Act, XX. of 1864, is not superseded by the provisions of the Code of Civil Procedure, Act XIV. of 1882, *Murlidhar v. Supda*, I. L. R. 3 Bom. 149.

(a) Viramitrodaya, quoted below, Bk. II. Chap. I. Sec. 1, Q. 7; 2 Str. H. L. 341, 348.

(b) But only during the minority, as generally "a partition is favourably viewed by the Hindū religion and law;" The Judicial Committee in *Juggut Mohinee Dossee v. Musst. Sokheemoney Dossee*, 14 M. I. A. at p. 303.

(c) To the guardianship the paternal male kindred have the preference, 2 Str. H. L. 74. Any one may come forward as a next friend for an infant, *ib.* 79. A relative is to be preferred, *ib.* 80.



the one preceding it, with their accompanying commentaries, imply a valid partition by the will of the adults alone. (a)

A partition, demanded on behalf of a minor by his guardian or friends, cannot usually be enforced against the will of the adult coparceners. But such a demand may be enforced, when it is necessary to prevent malversation or jeopardy to the minor's interests. (b) This opinion has been expressed by Mr. Colebrooke also in the passage quoted above; but it rests on the reason of the law, not on any express texts. In the case of *Govind Ramchandra v. Moro Raghunath*, (b) reference is made to *Sheo Nundun Singh v. Musst Ghunsam Kooer*, (c) and to *Shivji Hásam et al v. Datu Mávji Khojá*, (d) and the rule is repeated that "when the joint property of an undivided family governed by the Mitáksharâ law is enjoyed in its entirety by the whole family, and not in shares by the members, some of whom are adults, one member has not such an interest therein as is capable of being taken charge of, and separately managed, under the provisions of the Minors' Act (XX. of 1864)." (e) In the same case the District Judge was directed to report whether

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(a) *Kandasámi v. Doraisámi Ayyar*, I. L. R. 2 Mad. at p. 323, referring to 2 M. H. C. R. and to *Appovier's* case, 11 M. I. A. 75.

(b) App. No. I. of 1875 (under Act XX. of 1864), Bom. H. C. P. J. F. for 1875, p. 261; *Sviniyádr Pillai v. Chokkalingam Pillai*, 1 Mad. H. C. R. 105; *Alimel Ammal v. Arundchellam Pillai et al*, 3 *ibid.* 69; and *Kámákshi Ammal v. Chidambara Reddi et al*, 3 *ibid.* 94; 2 Str. H. E. 310, 362.

(c) 21 C. W. R. p. 143 C. R.

(d) 12 Bom. H. C. R. p. 281 (S. A. No. 316 of 1872).

(e) See also *Bhágirthibái v. Sadashiv*, Bom. H. C. P. J. F. 1881, p. 155, and *Samatsang v. Shivasangji and Ramasangji*, Bom. H. C. P. J. F. 1882, p. 404. But in *Doorga Parsad v. Baboo Keshav Parsad*, I. L. R. 8 Calc. 656, the Judicial Committee say: "It is clear that the manager of an estate, although he may have the power to manage the estate, is not the guardian of infant co-proprietors of that estate for the purpose of binding them by a bond as Hur Nandan did, or for the purpose of defending suits against them in respect of money advanced with reference to the estate. Act XL. of

on inquiry it seemed probable that the minor would benefit by a suit for partition brought against his uncles, against whom no "special instance of malversation," it was said, had been alleged. In *Meghashám Bhavánráo v. Vithalráo Bhavánráo*, (a) it had been said, "No doubt, the claim for partition advanced on behalf of a minor is one that must in every case be closely scrutinized.....Its result must in each instance depend on the view that the Court below takes of the evidence as rendering a partition necessary or not for the protection of the minor's interests." (b) A minor who has been used unfairly in a partition may repudiate it on attaining his majority or within a reasonable

1858.....shows that Sheo Nundan Persad, though he was a co-proprietor and manager of the estate, was not the guardian of the infants who, according to the Act, were subject to the jurisdiction of the Civil Court.....No certificate was obtained by Sheo Nundan Persad; and although it is stated that he was guardian to the infants he clearly was not the legal guardian, and had no right to defend that suit in their names." Hence it would seem a manager, to enable him to act for his infant co-sharers, must take out a certificate of guardianship, though the Court cannot on an application under the Minors' Act, XX. of 1864, remove the adult managing member from the control of the estate and business in which he and all the members of the family are interested. See *Bábaji Shrinivás v. Sheshgir Bhimaji*, I. L. R. 6 Bom. 593. The view of the High Courts has been that jurisdiction expressly given to the Civil Courts did not necessarily affect the ordinary relations of a Hindú family, and that before a partition there is no distinct property of the minor of which the manager has charge. All possess together, the manager administers. See *Appovier's case*, 11 M. I. A. 75; *Ramchundra Dutt v. Chundar Coomar Mundal*, 13 M. I. A. at p. 198. *Girdhari Lal's case*, L. R. 1 I. A. at p. 229 *ad. fin.* As to the representation of minors in suits see further Act XV. of 1880, Sec. 3, cl. (b); Act XIV. of 1882, Sec. 440 ss; *Jadow Mulji v. Chhagan Raichand*, I. L. R. 5 Bom. 306; *Babaji v. Maruti*, *ib.* 310, S. C. 11 Bom. H. C. R. 182.

(a) S. A. No. 148 of 1871, decided on the 14th of September 1871 (Bom. H. C. P. J. F. for 1871).

(b) In England a sale under the Partition Act sought on behalf of an infant will not be allowed unless it is for his benefit, *Rimington v. Hartley*, L. B. 14 C. D. 630.

time afterwards. (a) Where partition would be detrimental to the shares, the Court, it has been held, can refuse to decree a division. (b) But a somewhat different view was taken in *Ram Pershad Narain v. The Court of Wards*. (c) See further upon this point in Bk. II. Chap. III., Sec. 1, Q. 1.

§ 4c. 4. *Absentees*.—The absence of one or more coparceners does not bar partition, (d) if it is desired by the coparceners present. (e) All that the law requires is that their equitable shares, like those of the minors, be set apart in the division. For the definition of what constitutes absence in a foreign country, enabling the coparceners present to dispense with any expression of assent on the part of the absentee, see 1 Str. H. L. 188; Coleb. Dig., Bk. II., Chap. III., T. 26 and 27. The great change of circumstances that has occurred in recent times would make it necessary, for practical purposes, to fall back, in this case as in others, on the reason of the law, the essential part of which here is evidently the supposed impossibility of communicating with the absent co-sharer. The remarks of Sir T. Strange, l. c., as to the periods of twelve and twenty years, appear to

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(a) *Kallee Sunkur Saunyal et al v. Denendro Nath Saunyal et al*; 23 C. W. R. 68 C. R.; *Dharmaji et al v. Gurrao Shrinivas et al*, 10 Bom. H. C. R. 311.

(b) *Durbaree Sing et al v. Saligram et al*; 7 N. W. P. R. 271.

(c) 21 C. W. R. 152.

(d) Viramitrodaya, quoted below, Bk. II. Chap. I. Sec. 1, Q. 7. The Smṛiti Chandrikā, Chap. XIII. p. 21 ss, says that, when a par-cener having absented himself, the other par-ceners have divided the property in ignorance of his existence, he on his return is entitled to only half a share. Brihaspati is cited to this effect, but the passage is really inconsistent with others which follow.

(e) As to the presumption of death in the case of a person not heard of, this arises in the case of one who went away at less than forty years old after 20 years, at less than sixty years after 15 years, at any greater age after 12 years. The authorities however vary, see 1 Str. H. L. 188, 2 ib. 237, 316; Steele, L. C. 34; *Musst. Anundee Koonwur v. Khedoo Lal*, 14 M. 1. A. 412. For the present law see Act 1. of 1872, Sections 107, 108.

refer to the propriety or impropriety of a distribution of the property, without reserving the absentee's share. There is no text which enjoins the postponement of the division for the advantage of an absentee, and his interests are otherwise sufficiently protected. The descendants of an absentee may claim down to the seventh degree. (a)

§ 4c. 5. *Wives, Mothers, &c.*—Wives, mothers, grandmothers, sisters, &c., the female members of a united family, entitled to shares on partition, (b) are still not invested with any power to demand a partition of the estate. (c) This disability rests on the principle that males alone in a united family are regarded as heirs, with rights untransferable to females. The source of the right of females to a share on partition is

(a) 2 Str. H. L. 329; *Moro Vishvanath et al v. Ganesh Vithal et al*, 10 Bom. H. C. R. 444. As to Limitation, see above, p. 633 (c), and Sec. 4 D.

It was formerly a rule in most, if not in all parts of India, that a tenant of land paying assessment to the government as proprietor or quasi-proprietor might abandon the land for an indefinite time during which the Government could dispose of it for the benefit of the revenue, but subject always to a resumption of his former rights by the absentee on his return. See *Bhaskarappa v. The Collector of North Canara*, I. L. R. 3 Bom. 525. *Appa v. Juggoo*, 1 Morr. 57; above, p. 172; and below, Sec. 5 B. As to the disposal of a share of a village during the absence of a sharer by his co-sharers, see *Sirdar Sainey v. Piran Singh*, I. L. R. 3 All. 458. The partition binds absentees who have been effectively represented, *Sakharam Bhargao v. Ramchandram Bhaskar*, Bom. H. C. P. J. 1881, p. 280.

(b) This right arises on a partition whether voluntary or enforced by a creditor or purchaser in execution, *Bilaso v. Dinanath*, I. L. R. 8 All. 88.

(c) In Bengal a grandmother not a party to a partition suit was allowed to sue the parceners in order to secure her share along with the grandsons and grand-daughters, *Sibboosondery Dabia v. Bussoomutty Dabia*, I. L. R. 7 Calc. 191. Her right to a share is again recognized, *Badri Roy v. Bhugwat Narain*, I. L. R. 8 Calc. 649. The position of sisters in the line of heirs is by Nanda Pandita and Balambhatta fixed as next after that of brothers for reasons (see Coleb. Mit. Chap. II. Sec. 4, pl. 1 note; Stokes, H. L. B. 443,) rejected by the Privy Council in *Thakoorain Sahiba v. Mohun Lall*, 11 M. I. A.

the necessity to secure for them a certain provision, which otherwise might fail. In Bengal it has been ruled (*a*) that the widow of a member of a united family may claim a partition, the concession of which rests in the discretion of the Court. There, however, the widow of an undivided coparcener inherits his share, (*b*) on failure of sons, grandsons, and great-grandsons, though she has only the life enjoyment of the property, except under special circumstances. (*c*) Under the law of the Mitāksharā she succeeds only to a separated coparcener.

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at p. 402, but deriving some support from the use of the word *Santāna* = issue, in Sec. 5, pl. 4 (Stokes, H. L. B. 446), compared with Sec. 2, pl. 6, (*ibid.* 441) and Sec. 11, pl. 9 (*ibid.* 460). The right of sisters to an equal share seems to be recognized in the passage of Manu IX. 212, quoted in the Mitāksharā, Chap. II. Sec. 9, para. 12 (Stokes, H. L. B. 454). See also Nārada, Pt. II. Chap. XIII. sl. 13. But Manu IX. 118, is different. See above, pp. 464, 468.

The mother of two out of four sons of one father is entitled on partition to maintenance from all four, *Musst. Muncha v. Brijbooken et al*, Bom. Sel. Ca. p. 1. But according to Vijñāneśvara, 'It is a mere error to say that the wife takes nothing but a subsistence from the wealth of her husband (who died leaving no issue), and though she cannot demand a partition, she is, when a partition is made by the sons, entitled as their father's widow to a share equal to one of theirs, as his unmarried daughter to one-fourth of a share, Mit. Chap. I. Sec. 7 (Stokes, H. L. B. 397), Chap. II. Sec. 1, pl. 31 (Stokes, H. L. B. 436). See below, RIGHTS AND DUTIES ARISING ON PARTITION; *Lalljeet Singh v. Raj Coomar Singh*, 12 B. L. R. 373, 383; *Jo loonath Dey Sircar et al v. Brojonath Dey Sircar et al*, *ibid.* 385; *Ramappa Naiken v. Sithamal*, I. L. R. 2 Mad. 182, 186. In the last case it is pointed out that according to the Smṛiti Chandrikā the share or portion allotted to a mother is not to be regarded strictly as dāya, seeing she had not an ownership in it before. See above, p. 238.

In England the Court in dealing with a suit for partition will regard the equitable rights of all persons interested in the estate, *Rowlands v. Evans*, 30 Bea. 302; *Davis v. Turvey*, 32 *ibid.* 554.

(*a*) *Soudaminy Dossee v. Jogesh Chunder Dutt et al*, I. L. R. 2 Calc. 262.

(*b*) Dāya Bhāga, Chap. XI. Sec. 1, pl. 19, 44, 56; Stokes, H. L. B. 308, 315, 320.

(*c*) *Ibid.* pl. 62; Stokes, H. L. B. 321.

Even in Bengal (a) it seems to have been admitted that there were no reported decisions in favour of the widow's right, though it had apparently been recognised in numerous unreported cases. What is said in the same judgment as a reason for decreeing partition, "Otherwise she would be unable during her life to improve the heritage of her children," these children being daughters, implies the succession of the daughters, who also, according to the Mitâksharâ law, would be excluded in a united family. Their succession in Bengal would rest on their being, in the event of their survival, the next heirs, at the death of their mother, to her husband, their father.

§ 4c. 6. *Disqualifications for demanding a separation.*—Disqualifications to inherit operate equally to exclude from a share on partition, and consequently, from the right to demand a separation. The maintenance (b) of the excluded members must be provided for. (c)

According to Strange, Man. H. L. Sec. 319, a person who has fraudulently concealed a portion of the family property, loses, on discovery of such fraud, his right to a share. Sir T. Strange also, in H. L. Vol. 1, p. 232, seems to be of opinion, that the Mitâksharâ, Chap. I. Sec. 2, paras. 4, 5, and 12, (d) agrees with this rule, which is certainly laid down by Manu, IX. 213. But with regard to the Mitâksharâ, it would seem that the paras. 4—12 do not refer to the loss of the right to a share in case of fraud practised by a co-sharer, but to the criminality of the act only. The author first states the positive rules regarding the treatment of fraudulently concealed and recovered property in paras. 1—3, and then he goes on to combat the opinion held by some Hindû lawyers, that such a concealment of property

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(a) *Pokhmarain et al v. Musst. Seesphool*, 3 C. S. D. A. R. 114.

(b) See Book I., Introduction, pp. 153, 248, and Bk. I. pp. 576, 578.

(c) See below, 'LIABILITIES.'

(d) Stokes, H. L. B. 377, 380.

by a coparcener is not criminal. He is forced to do this, because the text of Yājñavalkya does not touch on the point, and, for the same reason, he is also forced to base his arguments on the verse of Manu (para. 5), though the doctrine contained in the latter is partly at variance with his own. The argument of the Mitāksharā has been understood in this manner by Mitramiśra also, who, after repeating the substance of Mitāksharā, l. c. paras. 1—12, adds:—(a)

“But the co-sharers ought not to inform the king, (if fraud has been committed by one of them). But even if an information has been laid, he (the king) ought to cause it to be restored by kind exhortations and the like. For Kātyāyana gives a rule, the manifest object of which is to enjoin that kindness only ought to be used, saying:—‘He (the king) shall never use force to cause the restoration of property taken away by a relation.’”

Hence it appears, that according to the authorities prevailing in the Bombay Presidency, a co-sharer, practising fraud, does not lose his right to a share. The same has been held also by the Mad. S. A. in *C. Lutchmeedavee v. Narasimma*, (b) and is recognized as law by the Smṛiti Chandrikā, Chap. XIV., para. 4 ss, and by Jagannātha in Colebrooke, Dig. Bk. V., Commentary on T. 376, and on T. 378 *ad fin.* (c) Compensation may be taken in a partition for flagrant malversation. (d)

§ 4D. *Will to effect a separation.*—The will of the united coparceners to effect a separation may be

1. *Stated explicitly* ; 2. *Or implied.*

1. As to *express will*, it may be evidenced by documents, (e) or by declarations before witnesses. (f) In some of the older

(a) Vīramitrodaya, f. 220, p. 2, l. 4, Transl, p. 247.

(b) Reports for 1858, p. 118.

(c) The Sarasvati Vilāsa, Sec. 784, is to the same effect. See the corrections at the end of the translation of that work.

(d) See below, Sec. 7; Steele, L. C. 212.

(e) Borr. Col. Lith. 39, 83, 100; Steele, L. C. 220, 221.

(f) A partition deed, as it requires registration, is inadmissible in evidence unregistered. Unregistered partition may however be proved by other evidence, *Govindaya v. Kotsur Venkapa Hegde*, Bom.

cases, it was held that the execution of a deed by the coparceners and a distribution *in specie* were not merely evidence of a partition, but were essential to make it valid. (a) But this doctrine has, for some time, been abandoned, and it is now recognised, that all which would be evidence of an assent or expression of will in other cases would be equally so in a case of partition, (b) and that the expression

H. C. P. J. F. for 1880, p. 210; *Kachubhai bin Gulabchand v. Krishnabai*, I. L. R. 2 Bom. 635. See Act III. of 1877. Secs. 17 and 50, and the cases *Burjorji v. Muncherji*, I. L. R. 5 Bom. 143; *Rámásámi v. Rámásámi*, I. L. R. 5 Mad. 115.

A family arrangement with respect to the estate must be given effect to when proved, *Mantappa v. Buswuntrao*, 14 M. I. A. 24.

(a) A farikhat or deed of mutual release has in several replies of the Śāstris, as those below, Bk. II. Chap. IV., been thought essential to the completeness of a partition. See *Oomedchund v. Gungadhar*, 3 Morr. 108. It was required by the custom of many castes, see Steele, L. C. pp. 213, 214. Similar answers were given in some instances to Borradaile's questions. Generally however it was deemed only one of the means of proof important on account of its formality, see Steele, L. C. 56, 214, and could be replaced by separate residence and enjoyment of shares, *ib.* 215. (Art. LXII.)

In Madras the mere execution of releases seems to have been thought insufficient without a corresponding severance of actual possession, see *Nagappa v. Mudundee*, M. S. D. A. Dec. for 1853, p. 125; *Kuppanmaul v. Panchanadaigane*, M. S. D. A. Dec. for 1859, p. 263. But when the intention is clear neither the other cases cited nor the original texts exact a physical division for a severance of interests. A father's deed of partition was held inoperative as not having been acted on, but it may have been thought that without action a unilateral expression of will was incomplete, *Bhovanmychurn v. Heirs of Ramkannt Binshoojea*, 2 C. S. D. A. R. 202. On the other hand a quiescent enjoyment of a particular portion of the once united estate for 19 years was held to imply assent to a partition assigning that portion to the holder of it, *Linga Mulloo Pitchama v. Linga Mulloo Gonappah*, M. S. D. A. Dec. for 1859, p. 84; and generally a partition in fact is as binding as one by express agreement, *Doe dem Gocalchandar Mitter v. Tarrachurn Mitter*, 1 Fult. 132; *i. e.* it may be proved by oral testimony and the conduct of the parties implying separation.

(b) *Rungama v. Atchama et al*, 4 M. I. A. at p. 68; *Mantena Rayaparaj v. Chekuri Venkataraj*, 1 M. H. C. R. 100; *Appovier v. Rama Subha*



of will, whether immediate or implied, is the sole criterion of division. This has been carried so far, that, where a partition had been planned and agreed to by coparceners, but not actually effected, the widow of one of the coparceners, who died in the mean time, was allowed to recover the

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*Aiyar et al*, 11 M. I. A. 75. Partition, not by metes and bounds, may yet be effectual. So *R. S. Venkata Gopala Narasimha Row v. R. S. Lakshama Venkama Row*, 13 M. I. A. at p. 139. See also Mit. Chap. I. Sec. 9, para. 1 (Stokes, H. L. B. 404); May. Chap. IV. Sec. 3, para. 2, quoted in a corrected translation under Bk. II. Chap. III. Sec. 3, Q. 5. In the case of *R. S. Lakshma Venkama Row v. R. S. Venkata Gopala Narasimha Row*, 3 M. H. C. R. 40, and in *Timama Kom Timapa v. Amchimani Parmaya*, S. A. No. 452 of 1874, Bom. H. C. P. J. F for 1875, p. 257, an agreement to be separate was held to constitute a separation. Indeed "the question, in every particular case, must be one of intention, whether the intention of the parties, to be inferred from the instruments they have executed and the acts they have done, was to effect such a division"; *Doorga Pershad et al v. Musst. Kundun Koovar*, 21 W. R. 214; S. C. 13 B. L. R. 235. *Rezun Persad v. Musst. Radha Beeby*, 4 M. I. A. 137, recognised a partition by mere agreement as good, though made during subsistence of a life-estate. In the case of *Roopchund v. Phoolchund et al*, at 2 Borr. 670, the Zilla Judge found that there had been no writing executed, but "that the brothers perfectly understood that certain parts were the share of each." The law officer and the Sudder Court held this sufficient to constitute a partition. In *Musst. Bannoo v. Kasheeram*, I. L. R. 3 Cal. 315, the Judicial Committee drew an inference in favour of partition from a petition by a member of a family asking that his name might be entered as owner of a moiety of land purchased by his father and his uncle out of joint hereditary funds.

Where, though there has not been an actual distribution *in specie*, the shares have been ascertained and an agreement made to hold in severalty, the former co-sharer is of course unfettered as to the disposal of his own portion, *Hurdwar Singh et al v. Luchmun Singh et al*, 4 Agra H. C. R. 42.

But a mere definition of a parceiver's interest, in terms of a fraction of the whole, does not, it has been said, itself constitute a legal separation, *Musst. Phooljhuree Kooer v. Ram Pershun Singh et al*, 17 W. R. 102, C. R. So also *Ambika Dat v. Sukhmani Kuar et al*, I. L. R. 1 All. 437, referred to below under Sec. 4 D 2 d. Comp. the cases below, p. 684.

share allotted to her deceased husband. (a) But there must be an actual severance of interests. An inchoate partition does not alter the rights of the co-sharers. (b) In *Kadapa et al v. Adrashapa*, (c) of two co-sharers suing a third for partition, one died; the remaining plaintiff insisted on his right to two-thirds as united with the deceased and virtually separated from the defendant by the institution of the suit, but the Court awarded him only a moiety of the joint estate. (d)

In a suit not in terms for a partition, but seeking a distinct share, a decree awarding a separate interest destroys the joint estate according to the doctrine of *Appovier v.*

In *Devapa Mahabala v. Ganapaya Annaya et al*, S. A. No. 125 of 1877, Bom. H. C. P. J. F. for 1877, p. 194, an oral agreement for partition having been made, one of the dividing coparceners, who subsequently received no part of the rents for more than 12 years, was then held barred, notwithstanding Art. 127 of Sch. II. of Act IX. of 1871, as the property from the time of the agreement ceased to be joint.

(a) *Ram Joshi v. Lakshmidai*, 1 Bom. H. C. R. 189; *Appovier v. Rama Subba Aiyar et al*, 8 C. W. R. 1. P. C., S. C., 11 M. I. A. 95. But see also *Sheo Dyal Tewaree v. Judoonath Teware et al*, 9 C. W. R. 62 C. R. as to (1) definition, (2) distinct enjoyment; and *Timma Reddy v. Ackamma*, 2 Mad H. C. 325; *Bai Suraj v. Desai Harlockandas*, B. H. C. P. J. 1881, p. 123. Tenants to three brothers, after a division amongst their landlords paid one of them his share of the rent, but on his death paid it to the surviving brother. The widow of the deceased recovered as heir to her husband in a suit for this share of the rent against the tenants, *Rakhmabai v. Bayaje*, S. A. 172 of 1874, Bom. H. C. P. J. 1874, p. 289.

(b) *Prawnkissen Mitter v. Shreemutty Ramsoondry Dossee*, 1 Fult. 110.

(c) R. A. No. 30 of 1874, Bom. H. C. P. J. F. for 1875, p. 182.

(d) The same principle, as to an adjustment of shares in ancestral property, caused by the death of a coparcener before actual partition was adopted in *Duljeet Sing v. Sheomunook Sing*, 1 Beng. S. D. A. R. 59, wherein the eldest of three undivided brothers having died leaving behind him a son, and the second without issue, the son of the eldest brother and the surviving brother were awarded each half a share in the property. In *Gungoo Mull v. Bunseedhur*, 1 N. W. P. R. for 1869, p. 79, a coparcener was held entitled, during his father's lifetime, to bring a suit to assert his right in the share which the father inherited from his deceased brother. See also Sec. 5 A, 1 a, below.

*Rama Subha Aiyar* ; (a) In *Babaji Pareshram v. Ramchandra Anunta*, (b) it was held that a decree declaring mortgagors divided, not carried out pending appeal by mortgagee, during which pendency one mortgagor died, had not effected a partition. This decision, resting on *Prankissen's* case, must be compared now with that of the Privy Council in *Chidambaram Chettiar v. Gouri Nachiar*. (c) There had in that case been an adjudication that the plaintiff was entitled to a moiety of the joint estate, but it did not appear that a decree had been drawn up. Still their Lordships held that the judgment was "equivalent to a declaratory decree declaring that there was to be a partition of the estate into moieties and making the brothers separate in estate from that date," so as to bring the case within the principle of *Appovier v. Rama Subha Aiyana*. (d) In the same case however, between the same parties, a decree for partition appealed against is suspended as to its definitive operation on the relative rights disposed of by it, and is subject to the decree in appeal, which has regard to the state of facts existing at its own date. (e)

An agreement to divide certain lands still to be recovered was held, in *Ramabai v. Jogan Soorybhan et al*, (f) not to constitute a severance of interest. Until recovered, the property would, it was ruled, continue joint estate. So property under mortgage may, when redeemed, be open to partition. (g)

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(a) 11 M. I. A. 75 ; *Joy Narain Giri v. Girish Chandru Myti*, L. R. 5 I. A. 228 ; see *infra*, Bk. II. Chap. III. Sec. 3, Q. 7.

(b) P. J. 1879, p. 535.

(c) L. R. 6 I. A. 177.

(d) Under the English Law it was held that a decree for sale and division of proceeds in a partition suit operated as a conversion of the estate even before the sale, *Arnold v. Dicon*, L. R. 19 Eq. 113.

(e) *Sakharam Mahadev Dange v. Hari Krishna Dange*, I. L. R. 6 Bom. 113, distinguishing *Joy Narain Giri v. Girish Chunder Myti*, I. L. R. 4 Calc. 434.

(f) S. A. No. 260 of 1871, Bom. H. C. P. J. F. for 1873, No. 35.

(g) *Balkrishna v. Harishankar*, 8 Bom. H. C. R. 64 A. C. J.

By some of the Hindû lawyers a separation such as to give one or more members their several shares is regarded as necessarily involving a general partition. (a) Those who have not separated are on this theory looked on as reunited, *see* Coleb., Dig. Bk. V. T. 433 *sub. fin.*, and the Mit. Chap. I. Sec. 6, paras. 1, 7, where it is assumed that in a partition under Mit. Chap. I. Sec. 2, para. 1, all the sons have become separated though some may have reunited with the father; *see* also Manu, IX., 212. Jagannâtha does not adopt this view, and it involves perhaps a certain confusion of thought as pointed out in the case above quoted, (b) but it rests also, probably, to some extent on the general necessity, under the Hindû law, of seisin or possession to validate any change of title, (c) no

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(a) *Sham Narain et al v. The Court of Wards*, 20 C. W. R. 201 C. R. Such a general partition might be supposed to be intended in *Gopal Anant v. Venkaji Narayan*, Bom. H. C. P. J. F. for 1878, p. 13, though the plaintiff was entitled to but one-fiftieth of the property. But the decree is, in its operative part, confined to the parties; and the ascertainment and declaration of all the shares which the High Court directed the Subordinate Judge to make, would not of itself constitute a partition where there was no mind amongst the parceners to divide. *See Gopal Anant Kamut v. Narayan Anant*, Bom. H. C. P. J. F. for 1878, p. 13, 230, and same case, *ibid.* 1879, p. 370; *Samatsang v. Shivasangji*, Bom. H. C. P. J. 1882, p. 404; *Chidambaram Chettiar v. Gowri Nachiar*, I. L. R. 2 Mad. 83. Above, p. 682.

(b) *Appovier v. Rama Subba Aiyan et al*, 11 M. I. A. 68.

(c) *Tarachand v. Lakshman*, I. L. R. 1 Bom. at p. 93; *Lallubhai Surchand v. Bai Amrit*, I. L. R. 2 Bom. 299. But registration serving as notice may complete an ownership without physical possession, *ibid.* 332; *Icharam Dayaram v. Rajji Jaga*, 11 Bom. H. C. R. 41, and prevents rights subsequently arising which would be inconsistent with the one thus secured, *Hasha v. Ragho*, I. L. R. 6 Bom. 165. In *Special Appeal 668 of 1881*, followed in a recent case, *Pemrúj Bhaváni-ram v. Narúyam Shivram*, I. L. R. 6 Bom. 215, it was ruled that in the case of a gift, even to a son, actual transfer of possession was requisite to complete the title of the donee. Registration it was held would not in such a case supply the want of possession. In the case at 2 Str. H. L. 7, Colebrooke says that "no doubt a gift may be made to an absent

ownership of any definite share being predicable of a particular coparcener while united. (a) The *Vivāda Chintāmani*, p. 79, says that a division of the property actually made into lots, but not completed by distribution, raises no separate interests.

When a parcener has been excluded from joint family property for twelve years a suit on his part to enforce his right to a share is barred by limitation. (b) His right is extinguished. His ground for a claim to partition is by this

person," but there a delivery may have been contemplated to a person on account of the donee. Under Sec. 25 of the Indian Contract Act, IX. of 1872, a gift to a son duly registered would apparently bind the father and his representatives without delivery of possession. Sec. 123 of the Transfer of Property Act, IV. of 1882, provides for the completion of a gift either by registration of the instrument, or in the case of moveable property by delivery, but this Act is not yet (A. D. 1883) in force in Bombay, see above, p. 179. In Madras possession is not necessary to complete a sale, *Vasudeva Bhattu v. Narasamma*, I. L. R. 5 Mad. 6. The instrument was registered after the executant's death by his widow. In *Bai Amrit's* case, I. L. R. 2 Bom. 299, registration is pronounced generally equivalent to possession. See the Transfer of Property Act, IV. of 1882, Sec. 54.

Possession obtained during the pendency of a suit gives the acquirer of it no *locus standi* to resist the successful plaintiffs when the new possessor has omitted to get himself made a defendant, *S. B. Shringarpure v. S. B. Pethe*, I. L. R. 2 Bom. 662. See *Radhabai kom Shrikrishna v. Shamrao Vinayak*, Bom. H. C. P. J. F. for 1881, p. 218.

A change of possession is not necessary to validate the transfer of a right not exercised by possession, such as the reversion of a landlord, or an equity of redemption in the case of a usufructuary mortgage. See *Kachu v. Kachoba* above, and *Lallubhai Surchand v. Bai Amrit*, I. L. R. 2 Bom. at pp. 325, 326; *Shripati v. Balvant*, Bom. H. C. P. J. 1881, p. 221. But one who has gained possession before the suit is a necessary party.

(a) Compare also above, p. 603, 633, and see the case of *Puree Jan Katoom et al v. Bykunt Chunder et al*, 9 C. W. R. 483, U. R.

(b) Act XV. of 1877, Sch. II. Art 127, and Sec. 28. The same limitation applies to a claim to an hereditary office (Art. 124), a periodical benefit (Art. 131), and possession due on the death of a female (Art. 141).

withdrawn, a partition having been practically effected by the law in his favour as well as against him, since exclusion implies mutual exclusion (a).

§ 4 D. 2. As to *implied will*, the Hindû authors are prolix in their discussions of the circumstances, from which separation or union may be inferred. (b) According to them the 'signs' of separation are :—

- a. The possession of separate shares.
- b. Living and dining apart.

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(a) See above, p. 633. The adverse possession by which those who enjoy it profit through limitation must be a possession incompatible with a recognition of the alleged concurrent right. Thus non-participation in the general profits of an estate is not an exclusion while the parcener holds certain lands in that character, *Pertabnarain v. Opindurnarain*, 1 C. S. D. A. R. 225. Conversely an enjoyment in the form of commensality bars limitation, *Rajoneekant Mitter v. Premchand Bose*, Marsh. R. 241. Mere non-participation in the profits was held not to constitute a cause of action from which limitation could be counted in *Shebo Sundari Dasi v. Kali Churan Rav* C. W. R. for 1864, p. 296. So *Benud Naik v. Doorga Churn Naik*, 1 C. W. R. 74. In *Chaghanlal v. Bapubhai*, Bom. H. C. P. J. 1880, p. 123, it was held that where a decree for a share of a vatan had been made in favour of a plaintiff he was not barred by the lapse of more than 12 years from recovering arrears due on account of such share. This may possibly be open to question, as the bar of limitation shuts out any consideration of the validity of the title thus barred, and the possession previously adverse, and as such made a cause of action, did not become less adverse through a decree against the possessor. Where on the other hand possession has begun under a title or in the exercise of a right implying the existence of another superior to itself, or concurrent with itself, the mere continuance of such possession does not constitute an exclusion. There must be some act contradictory of the right known to the person affected to impose on him the necessity of taking any step for the assertion of the right. See Ind. Evidence Act, I. of 1872, Secs. 114, 110; Lim. Act, XV. of 1877, Sch. II. Art. 127; *Dadoba v. Krishna*, I. L. R. 7 Bom. 34; and comp. Burge, Com. Vol. III. p. 13, 14; Domat. Ci. L. Vol. I. 886; *Board v. Board*, L. R. 9 Q. B. 48; *Williams v. Pott*, L. R. 12 E. Ca. 149.

(b) Mit. Chap. II. Sec. 12; Stokes, H. L. B. 466-7; May. Chap. IV. Sec. 7, paras. 27—35; Stokes, H. L. B. 80—82.

c. Commission of acts incompatible with a state of union, such as trading with or lending money to each other, or separately to third parties, mutual gifts or suretyship. They add also giving evidence for each other, but from this in the present day no inference can be deduced. (a)

The burden lies on a member, asserting that his acquisition of property has been made subsequently to a partition, of proving that it was not acquired as part of the joint estate. (b). In other words if he sets up a partition at a particular time or prior to particular transactions he must prove as he has averred it.

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(a) "A writing attested by them (kinsmen) is the best proof; on failure of that, one attested by other witnesses; failing that, mere oral testimony; and lastly, evidence of separate acts. Such is the order of proof." Jagannātha, in Coleb. Dig. Bk. V. T. 381. Nārada, Pt. II. Chap. XIII. para. 36, cited by Vyav. May. says, (1) evidence of kinsmen, (2) documentary proof, (3) separate transaction of affairs. Vyav. May. Chap. IV. Sec. 7, p. 27; Stokes, H. L. B. 80. Nilakantha adds separate possession of house and field, and so Vijnānēśvara, Mit. Chap. II. Sec. 12, Stokes, H. L. B. 466-7.

Under the English law a severance of a joint tenancy is caused by a course of dealing which implies such severance amongst the parties to such dealing. See *Williams v. Hensman*, 1 J. & H. 546, and a similar principle seems to be involved in *Ujamsi v. Bai Suraj*, Bom. H. C. P. J. 1881, p. 66. In *Ramchundur Dutt v. Chundar Coomar Mundul*, 13 M. I. A. at p. 198, it seems to have been thought that a mere alienation of a share to a stranger would bring the the relation of the parcener as a member of a joint family to an end, and make the alienee a co-owner with the other parceners. A sale by a joint tenant in England severs the joint-tenancy, but in India it is either ineffectual under the strict Hindû law or it gives to the purchaser a right only to have the transaction made good so far as is equitable by means of a partition. See above, pp. 602 ss.

(b) *Musst. Anundee Koonvour v. Khedoo Lal*, 14 M. I. A. 412; see also *Rewan Persal v. Musst. Radha Beeby*, 4 M. I. A. 137; *Moti Mulji v. Jammadas Mulji et al*, S. A. No. 77 of 1877, Bom. H. C. P. J. F. for 1877, p. 123. As there may be separate property without a division of the united family, the question is perhaps still more frequent of whether particular property of an undivided co-parcener is to rank as joint or as separate property. For such cases see below, Sec. 5 A.

d. The separate performance of religious ceremonies, i. e. of the daily *Vaiśvadeva*, or food-oblation in the fire preceding the morning-meal ; of the *Naivedya*, or food-oblation placed before the tutelary deity ; of the two daily morning and evening burnt-offerings ; of the *Śrāddhas* (a) or funeral oblations to the parents' manes, &c. (b)

None of these signs of separation can be regarded as by itself conclusive. Living and dining apart, on which the *Śāstris* appear to set great value, may justify an inference that separation has taken place, but it is not conclusive of the fact, since many coparceners live and dine apart, sometimes in the same village or house, for the sake of convenience. Other reasons too may necessitate the same arrangement, e.g. Government service taken by one or more of the coparceners. The Privy Council indeed have said that cesser of commensality is strong, but not conclusive, evidence of partition. (c)

The separate performance of the *Vaiśvadeva* sacrifice, of *Śrāddhas* and other religious rites is still less conclusive. In Book II. Chap. IV., Q. 4, *infra*, a passage of *Bhaṭṭojīdīkṣita* is quoted, according to which coparceners, living apart, may or may not perform the *Vaiśvadeva* each for himself, and, in the present condition of Hindū society, the performance of all religious rites has become so lax and irregular as to

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(a) On the *Śrāddhas* see H. H. Wilson, Works, VIII. 113 ; Coleb. Essays, vol. II. p. 180 ff. At p. 196 reference is made to the enumeration in the *Nirṇaya Sindhu*. On the *Vaiśvadeva*, *ibid* p. 203, 207, and Journ. Bo. B. R. A. Soc. vol. XV. p. 253. Comp. Mommsen, Hist. of Rome, vol. I. p. 173, 174, for the Roman domestic sacrifices. See also the Tagore Lectures for 1880, Lec. I.

(b) See Colebrooke and Ellis at 2 Str. H. L. 392.

(c) *Anundee Koonwar et al v. Khedoo Lal*, 18 C. W. R. 69 C. R., S. C. 14 M. I. A. 412 ; and as to separate residence, see *Vinayek Lakshman et al v. Chimnabai*, R. A. No. 44 of 1876, Bom. H. C. P. J. F. for 1877, p. 170 ; *Sheshapa v. Igapa bin Surapa*, R. A. No. 12 of 1873, *ibid* for 1875, p. 37.



afford no safe ground for inference. (a) Separate contracts, entered into by coparceners mutually or with third parties constitute, according to 1 Macn. H. L. 54 and 1 Str. H. L. p. 225—227, the most certain evidence of a partition. But even these raise no conclusive presumption *per se*, since it is consistent with a condition of union, that a coparcener should, concurrently, possess separate property (avibhājya), which implies separate transactions. (b) As no one of the marks of partition above enumerated can be considered conclusive, so neither can it be said that any particular assemblage of these alone will prove partition. It is in every case a question of fact to be determined like other questions of fact, upon the whole of the evidence adduced, circumstantial evidence being sufficient, as distinctly admitted indeed by Brihaspati. (c) This principle has been followed by the Privy Council in *Rewan Prasad v. Radha Bibi* and in other cases, and, in effect, supersedes the artificial rules of the Hindû Law (d)—rules, as Jagannâtha points out (Coleb.

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(a) “When brothers living apart separately perform the daily ceremonies of *Naivedya* and *Vaisvadeva* and have separate house and other property, they may be considered separated.” Q. 685, Poona, 17th August 1849, MS. Although three brothers may have had undivided family property some *prima facie* improbability of their continuing joint arises from their respectively carrying on the profession of pleaders in three different places, *Bhagirthibai v. Sadasivrar*, Bom. H. C. P. J. 1880, p. 126.

(b) Separate trading and separate acquisition are not proof of partition, *Vedavalli v. Narayana*, I. L. R. 2 Mad. 19.

(c) See *Dâyabhāga*, Chap. XIV. p. 8; Stokes, H. L. B. 362; see also Borr. Col. Lith. 264; Morley's Dig. Partition, pp. 484, 485; 2 Macn. H. L. 152; *Ruvee Bhudr v. Roopshunker*, 2 Borr. 713; *Sheshappa et al v. Igapa bin Surapa*, R. A. No. 12 of 1873, Bom. H. C. P. J. F. for 1875, p. 37.

(d) In *Lalla Mohabeer Pershad et al v. Musst. Kundun Koowar*, 8 C. W. R., 116 C. R. there is a case of a coparcenary converted by agreement into a simple mercantile partnership, in a judgment, affirmed by the Privy Council, *Doorga Pershad et al v. Musst. Kundun Koowar*, 21 C. W. R. 214, S. C., L. R. 1 I. A. 55. See *Dâyabhāga*,

Dig., Bk. V., T. 389, Comm. *ad fin.*), drawn from texts "founded on reason, not revelation, leaving room for the admission of presumptive proof." (a)

Chap. XI. Sec. 1, p. 30; Stokes, H. L. B. 311; Str. H. L. 395. Separation for fifty years was pronounced proof of a partition. See below, page 692.

(a) In his essay "On the Deficiencies, &c.," the late Prof. Goldstücker objected to what he called "the summary rejection as legal proof of all and each of the signs of separation." If by "legal proof" the Professor meant evidence forming a fit ground for inference, he went much beyond the statement he was criticising. If by "legal proof" he meant "conclusive proof," then the criticism is unfair only in substituting "the rejection of all and each," for a denial that any particular group of signs can, apart from its logically evidential weight, be conclusive. Jagannātha, in Coleb. Dig., after a discussion of the various signs of partition, which shows that they have severally a probative but not a conclusive force, winds up by saying "The texts are founded on reason, and the several arguments on each being equal, presumptive proof may be admitted on failure of written and oral evidence." Bk. V. Chap. VI. *ad fin.* In the same sense Mitramisra says of the several indications enumerated by Nārada, "It is not to be supposed that the inference arises only when all these jointly subsist, the intention is that the inference arises from all or some of them, the text being based on reason," Viram. 262. On the difference between actual proof and a mere "*Adyuharana*" (i. e. *Ud-dharana*) or indication, see the remark of Ellis, 2 Str. H. L. 392, who, at p. 398, says that the weight to be given to such tokens is "one of the many points reserved by the Hindū Law for equitable judgment." In *Ambika Dat v. Sukhmani Kuar et al*, I. L. R. 1 All. 437, a definition of shares, separate entries of the parceners' names as owners of those shares in the Government records, and the substitution on their deaths of their respective sons' names, were held insufficient, in the absence of evidence of separate enjoyment of profits, to prove partition. This is perhaps an extreme case, reference being made to *Appovier v. Rama Subba Aiyar*, 11 M. I. A. at p. 89, and to the separate contracts with the Government constituted by the separate entries of the parceners' names for several shares; but on the whole evidence the Court thought the intention to divide must have been abandoned. See *R. S. Venkata Gopala Narasimha v. R. S. Lakshmi Venkama Roy*, 3 Beng. L. R. 41 P. C.; *Baboo Doorga Pershad v. Musst. Kundun Koowar*, L. R. 1 I. A. at p. 70; *Pragdās v. Kishen*, I. L. R. 1 All. 503.

On the other hand, from the separate possession, by individual members of a family, of portions of the property once held in common, a presumption, though not an indisputable presumption, of partition arises. (a) This presumption is strengthened by length of time, and Nārada, Pt. II. Chap. XIII. sl. 41, (b) states, that a continuous separation for ten years is a proof of partition. This verse is quoted in the Smṛiti Chandrikā, Chap. XVI. as from Kātyāyana; and in the Sarasvati Vilāsa, Secs. 34, 811, as from the same source. In the latter work there is a long discussion of the means of proof of partition ending with a statement that where there is positive direct evidence, that is to be relied on; in its absence efficient causes, such as transactions which involve separateness of interests inconsistent with a continued union; and finally what are called memorial causes, as the separate performance of religious ceremonies, which, continued for a period of ten years, become effective in producing separation. This seems but another way of saying that a

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(a) See above, p. 681, 690.

(b) A various reading of Nārada, Part II. Chap. XIII. sl. 36, gives "*bhoga lekhyena*"="by enjoyment or record," instead of "*bhāga lekhyena*"="record of division." See Coleb. Mit. Chap. II. Sec. 12, p. 3 note, Stokes H. L. B. 467, and the case of *Bharangowda v. Sivangowda et al.*, S. A. No. 356 of 1873. Bom. H. C. P. J. F. for 1874, p. 184. Ten years is the period prescribed by Manu (Chap. VIII. 148) as that by which ownership is lost through adverse possession, but his rule does not give a prescriptive title to encroachments on land, or to public property, that of an infant, a pledge or a deposit (VIII. 149). Gautama also (Chap. XII. para. 37) gives ten years as the period of prescription except in favour of Śrotriyas, ascetics and Government officers; but he excludes land as well as females and animals from the rule. That the right to land was widely regarded as imprescriptible in the customary law has been shown above, p. 172; see too below, Sec. 5 B. Why female slaves should have been excepted from the general rule is less easy to explain, perhaps because of the more positive identification possible in their cases than in those of ordinary chattels. Yājñavalkya, II. 24, assigns twenty years for land and ten years for moveables. See *Lalubhāi Surchand v. Būi Amrit*, I. L. R. 2 Bom. at p. 307 ss.

presumption, weak at first, grows in strength with a repetition or continuance of the facts that give rise to it, until it becomes conclusive.

The fact that certain portions are admittedly held in severalty does not, it has been said, rebut the presumption of non-partition as to the rest of the family property, (a) and separate enjoyment merely as a matter of arrangement for the convenience of the family will not constitute partition. (b) This is the normal condition of a Khoti estate in Ratnagiri, and will not prove a partition as intended to be permanent, as held in *Bábáshet v. Jirshet*. (c) This last decision must, so far as it extends, qualify the rulings in *Musst. Mohroo Kooeree v. Mustt. Gunsoo Kooeree et al*, (d) *Shib Narain Bose v. Ram Nidhee Bose et al*, (e) and the old case of *Ruvee Bhudr v. Roopshunkur Shunkurjee et al*, (f) in which separate collections, and even a division of the income derived from a village, were held to be sufficient proofs of a partition. Even if, for common convenience, the parties took the profits of an estate in certain defined shares, still it would not be conclusive evidence of a separation. (g) Nor would false statements made by the parties for their common benefit. (h)

(a) *Sreeram Ghose et al v. Sreenath Dutt Chowdhry et al*, 7 C. W. R. 451 C. R.

(b) *Musst. Josoda Koonwur v. Gowrie Byjonath Sohaesing*, 6 C. W. R. 141 C. R.

(c) 5 Bom. H. C. R. 71 A. C. J.

(d) 8 C. W. R. 385 C. R.

(e) 9 *ibid.* 88.

(f) 2 Borr. 713.

(g) *Hariparsad v. Bapuji Kirpashankar*, S. A. No. 150 of 1872, Bom. H. C. P. J. F. for 1872, No. 134; *Vinayek Lakshaman et al v. Chimnabai*, R. A. No. 44 of 1876, *ibid.* for 1877, p. 170; *Sakho Narayan v. Narayan Bhikkaji*, 6 Bom. H. C. R. 238 A. C. J.

(h) *Musst. Phooljhuree Kooer v. Ram Pershun Singh et al*, 17 W. R. 102 C. R.

In *Sonatun Bysack v. Sreemutty Jugatsoondree Dossee* (a) the Privy Council say, "their Lordships are very clearly of opinion that the mere division of income for the convenience probably of the different members of the family did not amount to a division of the family." So as to mortgaged property redeemed by one member and then held by him exclusively for 20 years. (b) In a recent case it was held that a decree, which had on an agreement between the co-owners awarded to the one two-fifths and to the other three-fifths of a village, was not to be deemed an adjudication of partition in a subsequent suit between the representatives of the parties. (c) If it effected a severance of the rights it would apparently constitute a partition, but not if it merely defined the proportions of the interests. (d)

Where there had been a really exclusive enjoyment of any portion of the patrimony, a suit would, it was said, ordinarily be barred by the Limitation Act, XIV. of 1859, Sec. I., para. 13, after the lapse of twelve years, (e) and as to the general principle, it would seem that the older Bombay decision was more strictly in accordance than the recent ones with the Hindû Law as viewed by native commentators. A division of the proceeds is a recognized mode of distribu-

(a) 8 M. I. A. at p. 86.

(b) *Balu bin Bapurao v. Narayen Bhivrav*, P. J. 1874, p. 132.

(c) *Samatsang v. Shivasangji and Ramsangji*, Bom. H. C. P. J. 1882, p. 404.

(d) *Jay Narayan Giri v. Girishchundar Myti*, I. L. R. 4 Calc. 434. See the cases referred to above, and Sec. 7 A. 1 b below. It may be doubted whether this refinement would be admitted by a purely Hindû lawyer taking his stand on the principles stated in *Rama Subayanna's* case.

(e) *Umbika Churn Shet v. Bhuggobutty Churn Shet et al*, 3 C. W. R. 173 C. R.; *Vidyashankar et al v. Ganpatram*, S. A. No. 260 of 1873, Bom. H. C. P. J. F. for 1875, p. 351; *Shidojirav v. Naikojirav*, 10 Bom. H. C. R. 228, wherein it was held that the period during which the property was under attachment by Government, and during which neither party was in possession, is excluded from the operation of the Limitation Act (now Act XV. of 1877).

tion of the family property, *see* below, Sec. 7; and in the case of *Somangoudá v. Bharmangoudá*, (a) it was held that where a plaintiff admitted having had separate possession for sixteen years of a portion of the ancestral estate, it lay on him to prove that the family had remained undivided. (b) Exclusive

(a) 1 Bom. H. C. R. 43.

(b) The separate possession being *prima facie* an exclusive possession as owner (In. Ev. Act, I. of 1872, Sec. 110; *Keval v. Vishnu*, Bom. H. C. P. J. 1875, p. 368). It does not appear that the Hindû, like the Roman, lawyers elaborated any very clear theory of possession, distinct from proprietorship, as itself conferring rights. In the *Vyavahâra Mayûkha*, Chap II. Sec. 2 (Stokes, H. L. B. 31), possession is regarded merely as a means of proof, comparatively valueless without a title otherwise established. A law of prescription, however, is distinctly recognized, (Coleb. Dig. Bk. I. T. 113; Bk. V. T. 395, 396,) defined for the Bombay Presidency by Reg. V. of 1827; and in the case of conflicting titles possession gives him who holds it the preference. Coleb. Dig. Bk. I. T. 128 sqq. In the case of *Rajah Pedda Vencatapa v. Aroovala Roodrapa Naidoo*, 2 M. I. A. 504, it is laid down that "the title of possession must prevail until a good title is shown to the contrary." This is an adoption of the English law, the doctrine of which on this point, as Sir T. Strange (1 H. L. 38) observes, is substantially the same as that of the Hindû Law. *See* to the same effect *Pemráj v. Narayan*, I. L. R. 6 Bom. 215.

The Hindu law generally requires in the case of material property a transfer of possession to complete a change of ownership. *Yājñ.* II. 27; *Nârada*, Pt. I. Chap. IV. paras. 4, 5: but a right of entry or redemption may as such be transferred by mere contract, *see Bâi Suraj v. Dalpatram*, I. L. R. 6 Bom. 380, referring to *Raja Saheb Prahlad Sen v. Baboo Budhusing*, 12 M. I. A. 275, 307; *Mathews et al v. Girdharlal Fatechand*, 7 Bom. H. C. R. 4 O. C. J.; *Kachu v. Kachoba*, 10 Bom. H. C. R. 491; *Vásudev Hari v. Tâtia Náráyan*, I. L. R. 6 Bom. 387; and the cases cited in *Lakshmandas v. Dasrat*, I. L. R. 6 Bom. 175. In the last case the effect of non-possession and of registration in many different cases is discussed by Sir M. Westropp, C. J. *See also Lalubhai v. Bai Amrit*, I. L. R. 2 Bom. 299, 331, 332. In *Sobhagchand v. Bhaichand*, I. L. R. 6 Bom. 193, the effect of purchase at a sale in execution of property already equitably charged is considered.

Under the older English law transfer of possession was as necessary as under the Hindû law for a change of the right *in re*; *see* Bl. Com. Bk. II. Chaps. X. XX. Butler's note to Co. Lit. 330 b.

possession for 30 years affords conclusive proof of partition

Possession giving a preference to the mortgagee having it over one without it is sufficiently acquired by a *bond fide* attornment of the mortgagor as tenant to the mortgagee, *Anunt Bapu v. Arjun Gonda*, P. J. 1880, p. 293. The possession requisite to perfect a title may be acquired notwithstanding an irregularity in taking it, *Lillu v. Annaji*, I. L. R. 5 Bom. 387. The mortgagee's possession continued after payment of the mortgage debt does not necessarily become adverse, *Babla v. Vishnu Ballal Thakur*, Bom. H. C. P. J. F. of 1880, p. 294; *Comp. Steele*, L. C. 72; and on Pledges, pp. 251 ss.

As to possessory actions there have been very conflicting decisions. Compare *Khajah Enaetoollah v. Kishen Soondur et al*, 8 C. W. R. 386 C. R., with *Musst. Tukroonissa Begum et al v. Must. Mogul Jan Bebee*, 8 *ibid.* p. 370; *Kalee Chunder Sein et al v. Adoo Shaikh et al*, 9 C. W. R. 602 C. R., and *Kunbi Komapen Kurupu v. Changarachan Kandil*, 2 M. H. C. R. 313; and see also *Raddha Bullub Gossain et al v. Kishen Govind Gossain*, 9 C. W. R., 71 C. R.; and *George Clarke v. Bindavun Chunder Sircar et al*, C. W. R. Special Number, p. 20. The Specific Relief Act, I. of 1877, Sec. 9, gives a summary remedy to one dispossessed illegally, see *Sayaji v. Ramji*, I. L. R. 5 Bom. 446. A jurisdiction in such cases is given to Mamlatdars by Bombay Act III. of 1876. The present Limitation Act is Act XV. of 1877.

The relations of different parties concerned in a dispossession are discussed in *Virjivandas v. Mahomed Ali Khan*, I. L. R. 5 Bom. 208. A possession acquired permissively or by tenancy does not become adverse by mere non-payment of rent for more than 12 years. It must have become distinctly adverse and remained so for 12 years, in order that a claim for recovery may be barred. See the Limitation Act, XV. of 1877, Sched. II. Arts. 139, 144; *Radha Govind v. Inglis*, decided by the Privy Council on 6th July 1880; *Ramchandra Govind v. Vamanji*, Bom. H. C. P. J. 1881, p. 198.

In many cases of so-called tenancy in India it may be remarked the possession of the land is not really intended to be given to the cultivator. He is, especially where the produce is divided, rather in the position of a *colonus* or of a farmer, as in the earlier English law, (see Bracton, 27 b 220, Butler's note to Co. Li. 330 b; Bl. Com. Bk. III. Ch. IX. and Ch. XI.) with a license to enter and use the land but no interest in the land itself, only a personal right against the owner should the latter eject him. See *Venkatáchalam Chetti v. Andiappan Ambalam*, I. L. R. 2 Mad. 232. On the other hand payments are sometimes made by "tenants" who do not hold by a derivative title from their over-lord, and where there is not really a "reversion,"

and bars an action for further partition. (a) In *Anandrão Padaji v. Shidooji Anandrão* (b) one member of a Vatan family had exclusively held the Vatan lands and another the personal emoluments for 30 years. (c) It was held that this raised a presumption of partition, and in *Sitárám Vásudev v. Khanderáo* (d) it was ruled, that where there had been a separation of residence and non-participation by the plaintiff for more than 30 years before Act IX. of 1871 came into operation, an exclusive prescriptive title had been acquired by the defendant, under Reg. V. of 1827. The learned Judges in this last case must have supposed that there had been an exclusive possession held, in good faith, as sole proprietor for 30 years, as otherwise the possession by one joint tenant would have been the possession of all. (e)

there never having been a lease. The possession is that of owners subject only to a rate or quit-rent. See *Bhaskaráppá v. The Collector of North Canara*, I. L. R. 3 Bom. at pp. 545, 564; *Bábaji v. Náráyán*, ib. 340, and the cases there referred to.

(a) *Girdhur Purshotum et al v. Govind et al*, 7 Harr. 371; *Bhana Govind Guravi v. Vithoji Ladoji Guravi*, 3 Bom. H. C. R. 170 A. C. J.; *C. D. Rane et al v. G. R. Rane*, 3 *ibid.* 173 A. C. J.; *Svamiyacharya v. the Heirs of Moodgalacharya et al*, S. A. No. 94 of 1872, Bom. H. C. P. J. F. for 1875, p. 89, and the File for 1876, p. 132. Acquiescence in a distribution for 19 years was held conclusive in *Linga Mulloo Pitchanna v. L. M. Goruppa*, M. S. D. A. Dec. for 1859, p. 84. Under Act. XV. of 1877, Sec. 25, the title by possession held continuously will generally be completed by limitation concurrently with the extinction of the right to sue.

(b) S. A. No. 453 of 1871, Bom. H. C. P. J. F. for 1872.

(c) *Bharangowda v. Sivangowda et al*, *supra*, p. 692.

(d) I. L. R. 1 Bom. 286.

(e) See above, p. 633; 16 Vin. Abridgt. 456; Cr. Dig. Tit. XXXI. Ch. II.; 2 Sm. L. C. 606 ss.; 2. Ev. Pothier, 127; *Denys v. Shuckburgh*, 5 Jur. N. S. 21; *Murray v. Hall*, 18 L. J. C. P. 161; *Luckman Singh v. Shumshere Singh*, L. R. 2 I. A. 58; *Runjeet Singh et al v. Koorer Gujraj Singh*, L. R. 1 I. A. 9.

As to absolutely exclusive possession being necessary to constitute a bar against coparceners, see above, p. 633; *Shidooji v. Naikooji*, 10 B. H. C. R. 228, quoting *K. Subbaiya v. K. Rajeswara*, 4 M. H. C. R. 357;



Under Act XV. of 1877, Sch. II., Art. 127, time is counted for limitation against a claimant of a share only from his knowing of his exclusion. (a)

§ 4 E. The separation may be general or partial, i. e. it may extend to a partition of the whole of the property, or only to a portion of it. (b) In the latter case the mutual rights

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*Atmaram Baji v. Madhavrao Bapuji*, Bom. H. C. P. J. 1880, p. 311; *Kazi Ahmed v. Moro Keshav*, Bom. H. C. P. J. 1878, p. 120. In *Ramchandra v. Venkatrao*, I. L. R. 6 Bom. at p. 600, it was stated as a ground for inferring non-partition between the parties "that each is in enjoyment of some portion of the family property."

The Hindû Law of prescription is considered in the case of *Moro Vishwandth et al v. Ganesb Vithal et al*, 10 Bom. H. C. R. 444. The law of prescription under the Regulation is further discussed in the case of *Rambhat v. The Collector of Poona*, at I. L. R. 1 Bom. 592; and see above, Book I. Introduction, pages 73, 172; also *Thakur Durrýao Singh v. Thakur Davi Singh*, 13 B. L. R. 165, S. C., L. R. 1 I. A. 1.

Under the older Roman Law there was no usucapion of provincial land; but it might be acquired by a *longi temporis prescriptio* of 10 years during the presence of the former proprietor and of 20 years during his absence. (Comp. Yâjñ. II. 24; Manu VIII. 147; Nárada, Pt. I. Ch. IV. paras. 6, 7.) This was, by Justinian, made the universal law. He added a general prescription of 30 years free from the condition of an initial title provided the possession had begun in good faith, Cod. L. 7; 39, 8. See Poste's Gaius, pp. 159, 160. This is the original source of the term prescribed in Bom. Reg. V. of 1827, Sec. 1. See West's Bombay Code *ad loc.*, and Savigny's Syst. Vol. III. 380.

(a) *Hari v. Maruti*, I. L. R. 6 Bom. 741.

(b) *Reioun Persad v. Musst. Radha Beeby*, 4 M. I. A. 137; *Appovier v. Rama Subba Aiyar et al*, 11 *ibid.* 75; 2 Str. H. L. 377, 380, 387. A partition carried out partly in foreign territory was completed in British territory, *Kasi Yesaji v. Ramchandra Bhimaji Nabur*, Bom. H. C. P. J. for 1878, p. 151. In *Manjanátha v. Náráyan*, I. L. R. 5 Mad. 362, the case is dealt with of a claim to partition by a representative of one branch against the representative of another after partial partitions. These having been obtained by younger members during their fathers' lives and membership with others of a joint family could not properly have been enforced, see pp. 657, 661, and comp. p. 701. It is only when no progenitor in his own branch intervenes that a junior has an unqualified right to a severance of his share. The share due

and duties of the former coparceners in relation to the undivided residue of the estate remain generally as before partition. (a) If there be a conversion of the joint tenancy of an undivided family into a tenancy in common of the members of that undivided family the undivided family becomes a divided family with reference to the property that is the subject of that agreement. (b) A partial division, however, cannot be enforced: the coparcener must claim the whole of his share. (c) See below 'LIABILITIES ON INHERITANCE.'

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to each branch and sub-branch was held to be what it would have been had there been no partition, since the right centred in a single ancestor, minus so much as had in the partial partitions been previously given to members of such branch or sub-branch. According to the theory of those who regard a partial partition as involving a general partition and partial reunion, each branch and sub-branch in the case just discussed would be regarded as having rejoined with a share diminished by the sub-share of the severed member. There would then be room for an application of the principle stated in the Vyav. May. quoted above, p. 143; and equally so in the case of a reunion of one of two or more brothers who as a group had previously left the family and also separated *inter se*. One such bringing back but a third of what his branch had taken out could not be allowed to claim a repartition and the full share of his branch in the reunited estate, already diminished by two-thirds of that share. By treating the relative claims as subject to deduction as in the case quoted, a result is brought out identical with that contended for in the Mayūkha, if ancestral estate only is in question. It is in this sense that the reunited parcener "is remitted to his former status."

(a) *Ramabai v. Jogan Soorybhan et al*, S. A. No. 260 of 1871, Bom. H. C. P. J. F. for 1873, No. 35. In *Ātmārām Bijji v. Madhavarav Bapuji*, Bom. H. C. P. J. F. for 1880, p. 31, it was held that a family house reserved from partition was open to a supplemental partition, and that a family arrangement, if not shown to have been abandoned, was enforceable, though not acted on.

(b) Lord Westbury in *Appovier v. Rama Subba Aiyar*, 11 M. I. A. 75. See also *Timmi Reddy v. Achamma*, 2 M. H. C. R. 325.

(c) *Dadjee Deorav v. Vitul Deorav*, Bom. Sel. Ca. 172; *Ragrindrappa v. Soobapa*, S. A. No. 3948, 27th September 1858; *Nāndbhāi v. Nūthābhāi*, 7 Bom. H. C. R. 46 A. C. J.; *Jaitaram Bechur v. Bai Gunga*, 8 *ibid*.

It sometimes happens that litigation occurs as to a particular part of a joint estate without the existence of the remainder being disclosed. (a) In such cases the property in suit is naturally treated as the whole estate. Sometimes the whole of the interests of the members of a joint family in a defined property, as for instance in a "hakk," have been sold to several persons who become litigants. In such a case (b) it seems to have been tacitly assumed that the purchasers and mortgagees, by dealing with the parceners for their several interests in the fragment of the whole family property as distinct from the remainder, recognized their capacity to enter into such transactions without a general partition, and the continuance of mutual rights and obligations arising out of the union of the family with respect to the residue of the common estate. The case was disposed of by reference to the respective aliquot shares to which the grantors were *primâ facie* entitled, compared with each other and with those of the other members of the family. The latter members might however have claims which would diminish the *primâ facie* shares of the grantors; and the determination of the rights *inter se* of grantees from one member or branch, or between such grantees and their grantors, members of a joint family, must always be subordinate to the relative rights of such grantors and their coparceners in the joint estate. (c)

Though partial division is of very frequent occurrence in practice, the law books do not contain any special rules

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228 A. C. J.; *Trimbak Dikshit v. Narayan Dikshit*, 11 *ibid.* 69; *Murariapa v. Krishnapa et al*, S. A. No. 372 of 1872, Bom. H. C. P. J. F. for 1873, No. 15; *Mahadew et al v. Trimbuk Gopal*, S. A. 90 of 1872, *ibid.* No. 127; *Bajyram Vithal v. Atmaram Vithal*, Bom. H. C. P. J. 1881, p. 302. *Comp. Parbati Churn Deb v. Ainud Deen*, I. L. R. 7 Calc. 577.

(a) *Vainder Bhat v. Venktesh*, 10 Bom. H. C. R. at pp. 158, 159, 162.

(b) *Galla Motiram v. Naro Balkrishna*, Bom. H. C. P. J. F. for 1878, p. 69.

(c) See *Rakhmaji v. Tatia*, Bom. H. C. P. J. F. for 1880, p. 188.

on the subject. (a) But that it is not a mere modern innovation may be inferred from the passages relating to 'Naturally Indivisible Property' in the older Smritis. (b) In the absence of definite authorities, it is necessary to fall back here, as in other cases, on general principles and on actual decisions. Lands assigned for the subsistence of a widow or disqualified member are commonly reserved for future partition. Property left undivided, because mortgaged, was redeemed by the widow of one of the parties to the partition. She died and her daughter succeeded, but was compelled to give up the property redeemed to the son of one of her father's coparceners on a recoupment of the expenses of redemption. (c) So also where there had been a former suit for partition excluding a portion mortgaged. (d) So as to a part advisedly reserved for common enjoyment. (e) Limitation does not operate in such a case until, by exclusive possession as sole owner, one branch becomes entitled by prescription. (f)

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(a) Partial partition cannot, it was said, be decreed except by consent, *Radha Churn Dass v. Kripa Sindhu Dass*, I. L. R. 5 Cal. 474.

(b) "A remainder of an estate being undivided is not deemed disproof of a partition, for it frequently happens that disunited co-heirs have (retain) some joint property," Jag. in Coleb. Dig. Bk. V. T. 387, Comm., *ad fin.* Though partition may by accident have been incomplete, the parties are then in status divided, Smṛiti Chandrikā, Chap. XIV. para. 10. See above, pp. 681, 684, 692.

(c) *Khondaji Bhavani v. Salu Shivram*, S. A. No. 199 of 1874, Bom. H. C. P. J. F. for 1875, p. 50, following *Balkrishna Vithal et al v. Hari Shunker*, 8 Bom. H. C. R. 64 A. C. J.

(d) *Nārdyan Bābdji v. Pāndurang Rāmchandra et al*, 12 Bom. H. C. R. 148.

(e) *Gopāldacharya v. Keshav Daji*, S. A. No. 240 of 1876, Bom. H. C. P. J. F. for 1876, p. 244.

(f) *Svāmīrāyachārī v. The Heirs of Moodgalachāryi et al*, S. A. No. 94 of 1872, Bom. H. C. P. J. F. for 1875, p. 89, and the File for 1876, p. 132; *Salu et al v. Yemaji*, S. A. No. 291 of 1873, *ibid.* for 1873, p. 89; *Devapa v. Ganpaya et al*, S. A. No. 125 of 1877, *ibid.* for 1877, p. 194.

One of the most important questions arising in connexion with this subject is that of whether the law regulating the succession to an undivided or that applicable to a divided male's estate regulates the devolution of an undivided residue. Mr. Colebrooke (a) states that opinions have differed on this subject, but that the former view seems preferable. Most of the Śāstris (b) hold the same opinion, in favour of which the following considerations also may be urged. The law, which bases partition on the will of the coparceners, extends the partition no further than such will. If this extends only to a portion of the estate, their mutual rights and duties with respect to the remainder are unaltered. To the same effect is 1 Macn. H. L. 53. (c) It was said however that when an actual partition of part of a family estate had been proved it lay on those who asserted non-partition of the remainder (a banking business) to prove it. (d)

§ 4 F. *Partition final*.—A partition once agreed to is final, (e) except in the case of a mistake or fraud, which has materially affected the distribution. In both cases a

(a) 2 Str. H. L. 387. See p. 701, note (e).

(b) See Bk. I. Chap. I. Sec. 2, Q. 9, 11, 14, 22; *supra*, pp. 345, 347, 349, 352.

(c) Coleb. Dig. Bk. V. Chap. VIII. T. 431 Comm.; *Rewana Prasad v. Radha Bibi*, 4 M. I. A. 137; *Katama Natchiar v. The Rajah of Shivagunga*, 9 M. I. A. 539; *Timmi Reddy v. Achama*, 2 M. H. C. R. 325; *Maccandas v. Ganpatrao*, Perry's Or. Ca. 143.

(d) *Umiashankar v. Bai Ratan*, Bom. H. C. P. J. F. for 1878, p. 217, referring to *Narayan Babaji v. Nana Manohar*, 7 Bom. R. 153 A. C. J. Comp. p. 633 *supra*, and next note.

(e) Manu IX. 47; *Maharajah Hetnarain v. Baboo Modnarain Sing*, 7 M. I. A. 311; *Rango Mairal v. Chinto Ganesh et al*, S. A. No. 297 of 1874, Bom. H. C. P. J. F. for 1876, p. 74. A distribution acquiesced in will not be set aside, *Kunyah Pande et al v. Ram Dhun Pande*, 9 S. D. A. R. N. W. P. for 1854, p. 383.

But in the case of fraud or ignorance or of a part left undivided by arrangement, the Court will entertain a suit for partition of that

redistribution may be claimed by any parties injured, which, however, extends only to the portion overlooked or fraudulently abstracted. (a) It is subject to a proportional deduction from each coparcener's share on the birth of a posthumous son. (b) Misconduct in dealing with the common property to the injury of the co-sharers is a usual charge both in suits seeking to have a partition reopened and in those claiming a partition and an account. A partition is sometimes fraudulently resorted to, or the incapacity of the debtor is set up, or sham debts are admitted, and sham securities executed, in order to cheat the creditors of one or more co-sharers. On the other hand creditors come forward with or without collusion on the part of particular coparceners, especially ex-managers, to claim a partition or a revised partition for the satisfaction of unjust claims. Many decisions have had for their aim to defeat such schemes

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residue, *Nārāyan Babaji et al v. Nana Manohar et al*, 7 Bom. H. C. R. at p. 178 A. C. J.; *Lakshuman v. Krishnaji Ramajee et al*, S. A. No. 289 of 1869, Bom. H. C. P. J. F. for 1870.

Where shares of co-sharers are defined so as to consist solely of particular parts of the family property, but it is not actually divided in specie, the brothers are severally entitled to the shares as so defined notwithstanding subsequent changes in value, *Amrit Rav Vindyak v. Abaji Haibat*, Bom. H. C. P. J. for 1878, p. 293.

(a) Mit. Chap. I. Sec. 9, paras. 1 and 2; Stokes, H. L. B. 404; May. Chap. IV. Sec. 7, paras. 24 and 26; Stokes, H. L. B. 79. So, in the Roman law, a partition, really incomplete, though supposed to be complete, does not prevent the coparceners from afterwards claiming their further shares, because the provisional partition, without an abandonment of rights, is not juridically binding on them; Sav. Syst. III. 411. Compare the Smṛiti Chandrikā, Chap. XIV. paras. 7, 11 ff. When a previous partition has taken place, the burden of proving, in a subsequent suit, that the property, of which a division is sought, remained undivided, rests on the plaintiff, *Nārāyan Bābaji et al v. Nānā Manohar et al*, 7 Bom. H. C. R. 153 A. C. J.; *Maruti et al v. Vishwandth*, S. A. No. 233 of 1877, Bom. H. C. P. J. F. for 1877, p. 347.

(b) See below, § 7, "DUTIES AND RIGHTS ARISING ON PARTITION."

on the one side or the other, consistently with the recognized principles of the Hindu law. (a)

In Hindû as in English law, fraud vitiates every transaction. (b) It affords a ground for setting aside or rectifying

(a) As to limitation *see* above, p. 633, 697. Under the older law of limitation a plaintiff had to show his own possession within 12 years. Under Act. IX. of 1871 he could sue within 12 years of the possession challenged by him having become adverse, by the denial of a claim actually made by him. Possession by the Collector to protect the land revenue was not deemed adverse to the real proprietor, *Rao Kasan Singh v. Raja Bakar Ali Khan*, L. R. 9 I. A. 99. The law is the same under the Limitation Act, XV. of 1877, Sch. II. Art. 127, the time being counted from *knowledge of exclusion*. As to the coalescence of rights arising from sequence of possession by legal succession or privity but not without it, *see* Domat, C. L. vol. I. pp. 874, 875, and the cases referred to in *Asher v. Whitlock*, L. R. 1 Q. B. 1. The prescriptive title arising under section 28 of the Limitation Act is not created for the last of a series of mere possessors not connected by a legal derivation of right from the first to the last. It is only the original right that is extinguished by discontinuance of possession under Schedule II. Art. 142. If mere accidental instances of possession might be combined, each in turn would properly be connected with the original rightful possession, and being derived out of it would not avail for a greater interest than could be based on an accompanying title, which in such a case would not exist. That mere non-enjoyment is not equivalent to exclusion giving an adverse character to another parcener's possession, is shown by the case of *Vishnu Vishvanath v. Ramchandra Narhar*, Bo. H. C. P. J. 1883, p. 53. There a sole enjoyment of immoveable property by one brother for about 30 years, was followed by a partial partition, and that by a suit 7 or 8 years afterwards, which was not pronounced unsustainable. In *Hanaji Chhiba v. Valabh Chhiba*, Bo. H. C. P. J. 1883, p. 57, the common case is referred to of a son's going away for several years to gain his livelihood, leaving his father and brothers in sole enjoyment but on a joint right. This it was thought would not cause even Act XIV. of 1859 to bar a subsequent claim. *See* above, pp. 675, 685, 687, 695.

(b) Manu VIII. 165; Coleb. Dig. Bk. IV. T. 184; Vyav. May. Chap. IX. para. 10; *Vaman Ramchandra v. Dhondiba Krishnaji*, I. L. R. 4 Bom. 126, 153; *Bayabai v. Bálá*, 7 Bom. H. C. R. 1, 22, 23, App.; *Bálárám Nemchand v. Appa*, 9 Bom. H. C. R. 121, 146, 147; *Khushálbhai Narsidás v. Kabhai Jorábhái*, Bom. H. C. P. J. 1881, p. 231.

a partition, equally with any other transaction by which one parcener may endeavour, with or without assistance, to gain an unfair advantage at the cost of the others. But neither is the coparcenership allowed to be made a means of cheating outsiders who have engaged in transactions with particular members of the family. In *Khushálbhai v. Kabhai*, (a) a partition was set aside on the ground that a parcener had been unfairly used by his brothers. But in Bengal a nephew was allowed to profit by his suppression of a will which prevented his uncle's widow from adopting. (b) In some instances individual coparceners have affected, contrary to the law of the Mitáksharâ (Chap. I. Sec. 1, pl. 30, Stokes, H. L. B. 376) to sell or mortgage the common property or particular parts of it. The Privy Council have as to brethren adhered to the Mitáksharâ :—"Between undivided coparceners, there can be no alienation by one without the consent of the other," (c) at the same time that effect is given to the principle laid down by James, L. J., in *Syud Tuffuzzool v. Rughoonath Pershad*, (d) that the undivided share is property that a creditor can make available for payment of his claim. (e) A purchaser of an undivided share, though not entitled to any particular portion of the estate, can sue for a partition on the same terms as his vendor, and in the partition effect is to be given, so far as justice allows, to the particular transaction with the vendee or the mortgagee. (f) Neither therefore is a partition

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(a) *Supra*, p. 704, note (b).

(b) See above, p. 368.

(c) *Musst. Cheetha v. B. Miheen Lall*, 11 M. I. A. 369. In England a covenant by a joint tenant to sell severs the joint tenancy in equity as regards his share, *Brown v. Randle*, 3 Ves. 257; see *supra*, Bk. II. Introd. Sec. 4 C.

(d) 14 M. I. A. at p. 40.

(e) As to gift and devise see *Gangubai et al v. Ramanna*, 3 Bom. H. C. B. 66 A. C. J.; see p. 632, note (d). This agrees with the English law as to a joint tenancy, Co. Lit. 185 b.

(f) *Uddárm Sítárm v. Ránu Pánduji et al*, 11 Bom. H. C. R. 76; *Víthal Pándurang et al v. Purshottam Ramchandra et al*, S. A. No. 3 of



actually made allowed to defraud him. (a) But to prevent a converse fraud the purchaser from a single member must, in his suit, join all the members as defendants. (b) If the undivided coparcener is in sole possession, which he transfers to a vendee, the vendee may retain such possession as tenant in common with the other coparceners. (c) A contrary rule would tend to frauds on innocent purchasers. Until their several rights are ascertained the whole undivided property may be attached by a judgment creditor of one coparcener, (d) and if a coparcener's share be sold in execution, the purchaser acquires a right to demand a partition from the other coparceners, (e) though not more, even when the managing member has been sued only in his individual capacity. (f) Though in particular circumstances the manager may be held to have represented the whole family, (g) yet a suit for partition is generally necessary ; since the sale of his interest *as such* as answerable for the

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1876, Bom. H. C. P. J. F. for 1876, p. 77; *Devapa et al v. Hemsketi Shivapa*, S. A. No. 384 of 1874, *ibid*, p. 93; *Bai Tulsa v. Bhaji Adam Abraham*, Bom. H. C. P. J. F. for 1878, p. 263.

(a) See above, p. 664.

(b) *Sitaram Chandrashekar v. Sitaram Abdji*, S. A. No. 379 of 1874, Bom. H. C. P. J. F. for 1875, p. 140.

(c) *Kariapa Irapa v. Irapa Solbapa et al*, S. A. No. 231 of 1875, Bom. H. C. P. J. F. for 1876, p. 9; *Govind Narayan et al v. Vasudev Vinayak*, I. L. R. 1 Bom. 95; compare *Babaji v. Ramaji*, 2 Borr. R. 698.

(d) *Goma Mahad Patil v. Gokaldás Khimji*, I. L. R. 3 Bom. at p. 84.

(e) *Pandurung v. Bhaskar*, 11 Borr. R. 72; *Keshav Sakharan Dadhe v. Lakshman Sakharan*, Bom. H. C. P. J. F. for 1878, p. 123; *Udaram Sitaram v. Rānu Panduji et al*, 11 Bom. H. C. R. 76.

(f) See *Mahābalāyā v. Timāyā*, 12 Bom. H. C. R. 138; *Venkataramayyan v. Venkatasubramania*, I. L. R. 1 Mad. 358; *Pandurung Kamti v. Venktesh Pai*, Bom. H. C. P. J. F. for 1879, p. 513.

(g) See *Narayan Gop v. Pandurung Ganu*, I. L. R. 5 Bom. 685; *Mayaram Sevaram v. Jayvantrav Pandurung*, Bom. H. C. P. J. F.

decree transfers no more than his share. (a) The purchaser has acquired the rights of one co-sharer. In that character he obtains the legal position of a tenant in common, (b) and if put in possession, he may retain it in that character (c); but unless this has occurred the Court will not give him joint possession. He is put to his suit for a partition. So in a case of a mortgage improperly made and a suit thereon against the manager alone. (d) But a decree and execution,

for 1874, p. 41; *Gopal Anant Kamat v. Venkaji Narayan Kamat*, Bom. H. C. P. J. F. for 1879, p. 370; *Ram Sevak Das v. Raghabar*, I. L. R. 3 All. 72; *Gaya Din v. Bansi Kuar*, *ibid.* p. 191; *Jogendro Deb Roy Kut v. Funendro Deb Roy Kut*, 14 Moo. I. A. atp. 378; *Bissessur Lall Sahoo v. Maharajah Luchmessur Singh*, L. R. 6 I. A. 236.

(a) *Harsahaimal v. Maharaj Singh*, I. L. R. 2 All. 294; *Deen Dayal v. Jugdeep Narayan*, L. R. 4 I. A. 247; *Nanhak Joti v. Jaimangal Chaubey*, I. L. R. 3 All. 294.

(b) *Udaram Sitaram v. Ranu Panduji*, 11 Bom. H. C. R. at p. 81.

(c) *Mahabalayá Parmaya et al v. Timáyá Appaya et al*, 12 *ibid.* 138; *Babaji Lakshman et al v. Vasudev Vinayek*, I. L. R. 1 Bom. 95. As to separate possession by a united parcener see below. A purchaser at a Court sale can only seek for partition by suit; he is not entitled to joint possession, *Balaji Anant v. Ganesh Janardhan*, I. L. R. 5 Bom. at 500; *Dugappa Sheti v. Venkat Ramnaya*, *ib.* 493; *Pandurang Anandro v. Bhaskar Sadashiv*, 11 Bo. H. C. R. 72; *Krishnaji v. Sitaram*, I. L. R. 5 Bom. 496; contra *Indrasa v. Sadu*, *ib.* 505. See above, p. 607.

When one of two coparceners aliens to a stranger his share in a piece of family property, the other may either exercise his right of interdiction, or affirm the act and claim by partition to recover from the stranger that share to which the alienation cannot extend, and which has now become his separate property, *Sripatti Chinna Sanyasi Razu v. Sripatti S. Razu*, I. L. R. 5 Mad. 196. The right of interdiction does not seem to exist. By the strict Hindû Law a concurrence of all the coparceners is necessary to give effect to an alienation. By the decisions one coparcener may dispose of his interest against the will of the others, but an interest to be ascertained by a general partition; see *Pandurang v. Bhaskar*, *supra*.

(d) *Baji Shamraj Joshi v. Dev bin Babaji Jadhav*, Bom. H. C. P. J. F. for 1879, p. 238.

against a father as representative of a family were held binding on his sons (a). See *Bâbu Deen Dayâl Lâl v. Bâbu Jugdeep Nârâin Singh*, (b) where, referring to *Sadabart Prasâd Sahu v. Fool Bash Koer et al*, (c) and *Mahabeer Pershad v. Ramyad Singh et al*, (d) it was said that though the mortgage of an undivided share be invalid, yet execution may be had against it by a suit for partition by the purchaser in execution of the undivided share. This judgment established the seizable character of an undivided share (e) and a charge created by such attachment. In all such cases as these effect may be given to transactions approved by the law, and those disapproved may be defeated not only by means of a compulsory partition, but by the revision of one actually or fictitiously made.

### III.—DISTRIBUTION OF THE COMMON PROPERTY.

§ 5A. In a (suit for) partition the whole property of each member is presumed to belong to the common stock. (f) Every Hindû family is presumably joint in food, worship, and estate. (g) The common property may be distributable or undistributable. In both classes it may be:—

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(a) *Ram Narayan Lall v. Bhowani Prasad*, I. L. R. 3 All. 443. As to the case in which a father defendant may be held not to represent his infant sons, see *Gurusâmi v. Chinna Mannar*, I. L. R. 5 Mad. 37, 42.

(b) L. R. 4 I. A. 247.

(c) 3 B. L. R. 31 F. B.

(d) 12 B. L. R. 90.

(e) *Suraj Bunsee Koer v. Sheo Prasad*, L. R. 6 I. A. 88, 109; *Vasudev Bhat v. Venkatesh Sanbhav*, 10 Bom. H. C. R. 139; *Balaji v. Ganesâ*, I. L. R. 5 Bom. 499. Several of the decisions quoted in this paragraph have more or less distinctly been referred to different principles, but the purpose of the reference has generally been the prevention of fraud by moulding the Law of Partition to the exigencies of modern life.

(f) *Luximom Raw Sadasew v. Mullârow Baji*, 2 Knapp P. C. Ca. 60; *Bapu Purshotam v. Shivrâl Ramachandra*, Bom. H. C. P. J. 1879, p. 571. As to debts due by or to the family, see below, § 7 B. 1.

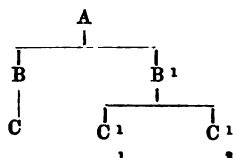
(g) *Neelkishto Deb Burmono v. Beer Chunder Thâkoor*, 12 M. I. A. 540; *Narayan Deshpande v. Anâji Deshpande*, I. L. R. 5 Bom. 130.

1. A grant to united parceners without distinction of shares. (a)
2. *Ancestral*, which may again be :—
  - a. Inherited,                      b. Or recovered.
3. *Self-acquired*.

2. a.—*Ancestral inherited property*.—Ancestral property, as amongst descendants, comprises property, transmitted in the direct male line from a common ancestor, and accretions to such property, made with the aid of the inherited ancestral estate. (b) In the absence of proof to the contrary it is assumed that a purchase by a member of a joint family is made on the joint account. (c) In *Ráj mohun Gossain v. Gour mohun Gossain*, (d) the Privy Council say of the term ancestral in an agreement amongst brothers :—“Ancestral is here employed.....in the sense of paternal, i. e. as mean-

(a) *Rádhábái v. Nánáráv*, I. L. R. 3 Bom. 151.

(b) *Bissessur Lall Sahoo v. Maharajah Luchmessur Singh*, L. R. 6 I. A. 233. In a family descended as follows :—



C¹ having purchased property out of the profits of the family estate, it was held that C was entitled as against C¹ to a moiety, *Keshoo Tewaree*

*v. Ishree Tewaree et al*, N. W. P. R. for 1861, p. 565. Immoveable property purchased with the capital or profits of ancestral moveable property ranks as immoveable ancestral property, not as moveable. It cannot be disposed of by a father without the assent of his sons, and the latter may insist on partition, *Shib Dayee v. Doorga Pershad*, 4 N. W. P. 71.

(c) *Gopeekrist Gosani v. Gungapersaud*, 6 M. I. A. 53; *Bissessur Lall Sahoo v. Maharajah Luchmessur Singh*, L. R. 6 I. A. at p. 236. So *Nathu v. Mahadu*, Bom. H. C. P. J. 1879, p. 569. See below, ‘SELF-ACQUIRED PROPERTY.’

(d) 8 M. I. A. at p. 96.

ing the property of the father in whatsoever manner or by whatsoever title the father had acquired it." To him it might be self-acquired, but to the sons it was ancestral estate. Thus, in the case of a father, head of a family, property inherited from his father or grandfather, is ancestral property, however acquired by its previous possessors. Ancestral property, mortgaged by the father and sold in execution, is subject to the claim to partition of the sons. (a) In *Gungoo Mull v. Bunseedhur*, (b) three sons having inherited on the death of the father, and one of them having afterwards died, the sons of a surviving brother were held to have an interest in the addition thus caused to their father's share, enabling one of them to sue a purchaser in execution for the allotment to him of his proper portion. The Court say:—"The father has no more absolute and exclusive right in ancestral property, which devolves on him by his brother's death than he has in the like property, which he inherits from his father." The case seems to have been imperfectly brought before the Court. The family being joint, it does not appear how one of the three brothers could, on the death of another, succeed to the whole instead of a moiety of his share, or how one of his three sons could sue alone, or sue his father's judgment-creditor or execution-purchaser alone for his one-third share in his father's estate, without claiming a general partition of the family property.

On the other hand, property inherited by a father from females, brothers, or collaterals, or directly from a great-great-grandfather, appears to be subject to the same rules as if self-acquired. (c) Ancestral property, in fact,

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(a) *Lochun Singh et al v. Nemdharees Singh et al*, 20 C. W. R. 170.

(b) 1 N. W. P. R. 79.

(c) *Baboo Nund Coomar Lall et al v. Moulvie Razee-ood-deen Hoosein*, 10 Beng. L. R. 183 S. C., 18 C. W. R. 477; *Gooroochurn Doss et al v. Goolukmoney Dossee*, 1 Fult. 165; *R. Nallatambi Chetti v. R. Makunda Chetti*, 3 M. H. C. R. 455, 457. In *Muttayan Chetti v. Sivagiri Zamindar*, I. L. R. 3 Mad. at p. 375, it is said that property inherited from

may be said to be co-extensive with the objects of the *apratibandhadāya*, or 'unobstructed inheritance:' the contrast drawn in the Sanskrit authorities is between *pitrārjit*

a mother, (which according to the now prevailing doctrine would generally be looked on as inherited from her father, or some other male relative,) is not to be ranked in the same class with self-acquired. This, which may perhaps be regarded as extra-judicial, is opposed to the judgment of Sir A. Bittlestone and the other authorities referred to in this note. The chief ground for the doctrine seems to be a passage in the Mit. Chap. I. Sec. IV. para. 2, in which Vijñāneśvara extends the condition of a separate acquisition's having been made without detriment to the paternal estate by analogy to the maternal estate, which in some cases brothers inherit equally (Mit. Chap. II. Sec. XI. para. 20). There is no inborn right of a son to a maternally as to a paternally descended estate. In the case of patrimony the right is one of co-ownership, and it is this right only that qualifies the father's ownership and power of disposition. It is on this that Vijñāneśvara grounds the son's right to an interdiction: in its absence the father might dispose of the ancestral as well as of the other property, and a mother's estate is not ancestral within the meaning of the Sanskrit term, though for some purposes the analogy of the patrimony has been extended to it. These particular extensions imply a general difference in kind, and a usual incident of ownership is not to be extinguished without a clear rule to that end. The Mayūkha in dealing with the Sanskrit text of Yājñavalkya, on which Vijñāneśvara's discussion is founded (*see* Vyav. May. Chap. IV. Sec. VII. para. 2 ff; Yājñ. II. 118) does not, any more than the text itself, mention a maternal heritage. In Sec. II. of the same Chapter, though it quotes a passage limiting "dāya" to the "wealth of a father," it says that father stands for "relations in general," but again in Sec. X., para. 26, it does not place the son's inheritance to the mother's property on an immediate participation by birth as in the case of the patrimony. On the theory of the woman's estate being merely interpolated, the maternal grandson's right may be called "dāya," but not patrimonial. On the whole Jagannātha's reasoning seems to be the best. Complete ownership in him who takes an estate is the general principle of the Hindū law, modified only by the texts which dedicate ancestral and in part self-acquired lands to the nurture of the agnatic line of manes and descendants. Had Vijñāneśvara recognized in the sons a joint ownership along with their mother in her separate estate it is unlikely that he should not have said so in the

“acquired by fathers,” and *svârjit* “acquired by one’s self.” (a) The view, here stated, agrees with that arrived at by Jagan-nâtha, (b) after a discussion of the contrary doctrines held by other lawyers. (c) This discussion itself shows, however, that there is much to be said on both sides, and the question must be regarded as one still in controversy. Those, who hold that all property descending to the father from relations ranks as ancestral property, interpret the text of Yājñavalkya, (d) which relates to the grandfather’s property, as an example of the principle that all property, taken by right of affinity, (e) is to be regarded as ancestral. Those, on the other hand, who maintain that property regularly transmitted from ancestors in the male line, and that alone, is ancestral property, understand the text to imply affinity only of that closest kind which its terms necessarily import, namely that existing between an

discussion by which he establishes their joint ownership with the father over ancestral property. The text of Yājñavalkya, which declares the equal ownership of father and son, does not include a mother. (See Mit. Chap. I. Sec. V. para. 13 ff). The inheritance to her is rather by succession than by survivorship, (see Vyav. May. Chap. IV. Sec. II. paras. 1, 2) and the estate which the son has not himself gained through joint ownership need not in his hands be subject to a joint ownership and the other incidents of an ancestral heritage. Amongst some of the tribes in the Panjâb, property inherited through the mother is excluded from the aggregate for partition. Amongst others all property of every kind is included. Panj. Cust. Law, Vol. II. 170.

(a) Bk. I. Introd. p. 65, 77, ss. A similar distinction is made by the Customary Law: see Steele, L. C. p. 53.

(b) Coleb. Dig. Bk. V. Chap. II. T. 103. “What is received from the maternal grandfather must not be considered as having descended from ancestors, but as acquired by the man himself.” Coleb. Dig. Bk. II. Ch. IV. T. 28, Comm.

(c) This view was approved and adopted in the case of *B. Nand Comar Lall et al v. Moulvee Razee-ood-deen Hoosein et al*, 18 C. W. R. 477.

(d) Mit. Chap. I. Sec. 5, para. 3.

(e) See also Colebrooke, Dig. loc. cit.

ancestor and his first three descendants. (a) On considering the former of these conflicting views, it presents this difficulty, that it assigns, in many cases, to a son equal power with his father over property which, but for his father's taking it could never come to him, while, in the example given in the text, the intervention of the father is immaterial. The property held by a grandfather must come to his grandson, and that of a great-grandfather to his great-grandson, in the male line, whether the intervening descendants survive or not, whereas the property of a great-grandfather descends to his great-grandson, through his daughter, only if first inherited by his daughter's son. (b) It may further be objected that the equal right of the grandson with his father in the property of the grandfather is a supersession of the more ancient rule, supported by numerous texts, of the father's independence and supremacy over his family and estate. (c) It would appear

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(a) See also Colebrooke, *Dig. loc. cit. sub fin.* In Kangra, "by ancestral lands is generally understood land once held by the common ancestor, not all land whatsoever inherited by the donor" (to a daughter and her children), Panj. Cust. Law, Vol. II. p. 185.

(b) As the passage of Yājñavalkya, Mit. Chap. II. Sec. I. para. 2, specifying the daughter is extended, *ib.* Sec. II. para. 6, by the aid of Vishṇu XV. 47, to a daughter's son, but no further.

(c) See Nārada, Pt. I. Chap. III. paras. 36. 40; Pt. II. Chap. IV. para. 4; Pt. II. Chap. V. para. 39; Manu IX. 104; Vyav. May. Chap. IV. Sec. 1, pl. 4, 5; Stokes, H. L. B. 43; Mit. Chap. I. Sec. 1, para. 24; Stokes, H. L. B. 375. The father appears in the earliest form of the law to have had unqualified administrative power and to have had complete dominion over the family (*see above*, pp. 69, 281, 646). The rights of the manes at the same time made an alienation of the ancestral estate unlawful, and the interest felt in a son as a continuator of the family sacra to be celebrated with indispensable offerings out of the patrimony (*see* Vishṇu, Transl. 189) raised him first in religion and then in law to a joint-ownership with his father. It became recognized far earlier than at Rome that the "*patria potestas in benignitate non in atrocitate consistit*," as the highly affectionate character of the Hindūs readily admitted sons to a position of secure equality in title, though not till afterwards in administra-



dangerous to extend the supersession in the absence of explicit texts, on the strength of an interpretation.

An objection, commonly urged against the second view, is that, by classing property inherited by the father from relations with self-acquired property, an undue extension is given to the latter term, since acquisition (*arjana*) implies an individual effort. Jagannâtha, *l. c.*, felicitously meets this objection by showing that such an extension must be allowed in other cases, such as those of a priest inheriting from his Yajamâna, *i. e.* the person for whom he sacrifices, and of an Âchârya or religious teacher inheriting from his pupil. (a) It is impossible to class such inheritances as ancestral property, since the text, by instancing a grandfather, whose relationship is one of blood, cannot imply the spiritual relationship existing between a teacher and his pupil, or between a priest and his Yajamâna. Though inherited therefore, such estates still rank in contradistinction to the “*pitrârjit*,” as “*svârjit*” or self-acquired, which thus becomes equivalent to “in any way acquired except by succession through descent and participation of rights.”

In a recent case (b) the Privy Council have said that a zamindari inherited through a mother was not self-acquired property, but they expressed no opinion whether it was subject to the same restrictions on alienation or hypothecation as if it had descended to the zamindar from his father or grandfather. It may be concluded therefore that the

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tion. Then followed the right of interdiction to guard against impious waste, and lastly the right to partition as a logical consequence of co-ownership. The archaic law has in part been revived by recent cases. As to sale of ancestral property by a father or by the Court, *see above*, pp. 631, 637 *ss*; *Narayanacharya v. Norso Krishna et al*, I. L. R. 1 Bom. 262; *Kastur Bhavani v. Appa and Sitaram*, S. A. No. 124 of 1876, Bom. H. C. P. J. F. for 1876, p. 162.

(a) As to a *Vṛitti* regarded as a heritable estate, *see* 2 Str. H. L. 12.

(b) *Muttayan Chettiar v. Sangili Vira Pandia*, L. R. 9 I. A. 128, reversing I. L. R. 3 Mad. 370.

more extensive construction of “pitṛárjit” or “ancestral” is that which in the future is to prevail, though probably without the consequence of giving to the son equal power with the father over such ancestral property which is not in the stricter sense “patrimonial” by agnatic descent. (a) In the Madras decision it is said that property may at the same time be not “ancestral in the sense in which property inherited by the father from the paternal grandfather is liable to partition under the Mitāksharā Law at the instance of the son,” and yet “not self-acquired property on that ground for purposes other than those of partition.” This notion of the property being of one class for one purpose and of another for another is a subtilty which the authorities do not apparently warrant, and which would lead to contradictory consequences. The rules for partition of inherited property point to male lineal inheritance, leaving property owned in any other right to be distributed as self-acquired, or according to the special rules applicable on account of the character of the property as sacred or secular, or as affected or not with the support of public duties. (b)

The nature of ancestral property, as between a father and his sons, is not affected by the circumstance of a partition having taken place between the father and his coparceners. The general principle is laid down by Yājñavalkya(c):—“The ownership of father and son is the same in the land which was acquired by the grandfather, or in a corrody or in chattels, which belonged to him.” Vijñāneśvara, in his remarks introducing the text quoted, explicitly states, that it is given to meet the case of a doubt that might otherwise be felt, in the case of a separation having taken place between a father and a grandfather. The doctrine has been correctly appre-

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(a) See Mit. Chap. I. Sec. I. para. 27 ; Sec. II. para. 6 ; Chap. VI. Sec. 7, paras. 9, 10, and the judgments referred to in p. 710, note (c).

(b) Above, p. 179.

(c) Mit. Chap. I. Sec. 5, para. 3 ; Stokes, H. L. B. 391.

hended by the Calcutta High Court, in *Muddun Gopal Thakoor et al v. Ram Baksh Panday et al*, (a) where the authorities are discussed at length. It has been said indeed that "the divided share of a Hindû in property, which had previously belonged to the united family, is separate estate, and, like any other estate held in severalty (such, for instance, as self-acquired property), is assets, while yet in the hands of the heir, for payment of the debts of the deceased proprietor." (b) In *Girdharilal's* case, (c) and some others, (d) this last rule has been practically absorbed in a wider one, but at the date of the earlier decision separateness of estate was thought essential to the liability. In the case of *Kattama Natchiar v. The Râjâ of Sivagangâ* too, (e) the Privy Council laid down the rule, "When property belonging in common to a united Hindû family has been divided, the divided shares go in the general course of descent of separate property." But from this it must not be understood that the nature of the property, as ancestral estate, is changed. Such a view, originally held in the case of

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(a) 6 C. W. R. 73 C. R.

(b) *Uddrâm Sitrâm v. Ranu Panduji et al*, 11 Bom. H. C R. at p. 83.

(c) 22 W. R. 56 C. R. S. C, L. R. 1 I. A. 321.

(d) *Haza Hira v. Bhairi Modan*, S. A. No. 444 of 1874, Bom. H. C. P. J. F. for 1875, p. 97.

(e) 9 M. I. A. 609. The judgment of their Lordships was subjected to some hypercriticism by the late Prof. Goldstücker (On the Deficiencies, &c., p. 14 ss) who seems to have overlooked (p. 16) that the religious benefits for which ancestral property is inherited (see *Dâyabhâga*, Chap. XI. Sec. 1, para. 32; Stokes, H. L. B. 312; Sec. 6, paras. 30, 31; Stokes, H. L. B. 351) are not a cause for the disposal of property not acquired by descent from a former owner, assumed to be still, in the spirit world, interested in the purposes to which it is applied. That undivided members may make separate acquisitions, see *Coleb. Dig. Bk. V. T. 38 Comm.*, and above Bk. I. Chap. II. Sec. 6A, Q. 9, p. 399. Several cases occur in 2 Str. H. L. at page 439, the *Smṛiti Chandrikâ* being quoted as assuming such acquisitions to be possible. So at p. 441 the *Mâdhavya*.

*Lakshmibái v. Ganpat Morobá et al*, (a) was dissented from on appeal. (b) The share taken on a partition is indeed separate estate as regards the other branches of the family (c); but in the branch to which it belongs, it is ancestral estate, subject in the hands of sons to the father's debts, with the exception of those immorally incurred, on account of the special obligation arising from filial duty, (d) but not on account of its ranking as self-acquired property of the father. Jagannátha says that ancestral property, remaining in the hands of a father on a partition with his sons, retains that character for the purposes of a partition with subsequently born sons; (e) while free from obligations to those

(a) 4 Bom. H. C. R. 150 O. C. J.

(b) See 5 Bom. H. C. R. 135 O. C. J.

(c) See the case of *Gavuri Devama Garu v. Raman Dora Garu*, 6 M. H. C. R. at p. 93, quoted under Bk. I. Chap. II. Sec. 11, Q. 5; above p. 456; *Periasami v. Periasami*, L. R. 5 I. A. 61. In that case a family estate made over by the eldest to the younger brothers was said by the Privy Council to have passed "with of course all its incidents of impartibility and peculiar course of descent," (*ib.* at p. 75). A property renounced by an elder brother in favour of the younger ones becomes their estate as in a partition, though there be no general partition. See *Gauri Devama's* case. The "incidents" in these cases would depend on the family law or the political conditions of the estate; see above, pp. 158, 172, 179, 237.

(d) Above, pp. 156, 642.

(e) Coleb. Dig. Bk. V. T. 392. Similarly under the English law, "If parceners make a partition of their land, they are still in of their respective shares by inheritance, though these shares are no longer held in coparcenary, but in severalty." 1 Steph. Comm. 443. So *Doe Dem Crosthwaite v. Dixon*, 5 A. & E. 835. And thus in *Baijun Doobey v. Brij Bookun Lall Awasti*, L. R. 2 I. A. 278, the Privy Council call a share obtained or ascertained and severed in a partition "separate estate," but at the same time, "ancestral estate derived from the father." Tenants of the united family retain their rights as against the individual member to whom the land held by them has been assigned in a partition of the estate, *Naráyan Bhivráv v. Káshi*, I. L. R. 6 Bom. 67. See below, Bk. II. Chap. I. Sec. 1, Q. 5, Remark.

who have separated. Nor can special restrictions be imposed on the dealing of a co-sharer with his divided share by an agreement made amongst the sharers at the time of partition inconsistent with the nature of the estate taken by the co-sharer. (a)

§ 5A. 2. *b.*—*Ancestral property, Recovered.*—As regards property recovered, the cases must be distinguished of

- (1) Recovery by a father, head of the family, and of
- (2) Recovery by another coparcener,
  - (a) With or without the aid of the patrimony.
  - (b) Of moveables or of immoveables.

(1) Ancestral property recovered by a father, head of a family, ranks as self-acquired. (b) This rule, however, is in the *Mayūkha* qualified by a text (c) cited from *Bṛihaspati*, which imposes the condition that such a recovery must have been made without the aid of the ancestral property.

(2) Ancestral property recovered by another coparcener with the aid of the patrimony becomes an accretion to the common estate. Immoveables, recovered by such a coparcener without the aid of the patrimony, but with the acquiescence of the other co-sharers, rank likewise as an accretion to the common property, subject to a deduction of one-fourth for the acquirer. (d) This rule has been recognised by the Bombay High Court in *Mulhari v.*

(a) *Venkatramana v. Brammana*, 4 M. H. C. R. 345.

(b) *Mit.* Chap. I. Sec. 5, para. 11; *Stokes*, H. L. B. 393.

(c) *May.* Chap. IV. Sec. 4, para. 5; *Stokes*, H. L. B. 48. So *Vīram.* Tr. p. 74. Compare also *Dāyabhāga*, Chap. VI. Sec. 2, paras. 31–35; *Stokes*, H. L. B. 285, 286; *Jagannātha's Commentary*, *Colebrooke*, Dig. Bk. V. T. 25; and *Smṛiti Chandrikā*, Chap. VIII. para. 28.

(d) *Mit.* Chap. I. Sec. 4, para. 3; *Stokes*, H. L. B. 385; *May.* Chap. IV. Sec. 7, para. 3; *Stokes*, H. L. B. 74. See *Smṛiti Chandrikā*, Chap. VII. paras. 32–33; *Naraganti Achammagāru v. Venkatachalapati*, I. L. R. 4 Mad. 259, 260.

*Shekoji.* (a) It seems probable from the wording of the texts upon which this doctrine rests, that they contemplate the cases only of property forfeited or withdrawn from the family estate otherwise than by voluntary and valid alienation. This view seems to be strongly supported by the words “*hṛita*” (i. e. that which has been taken or seized), (b) and “*nashta*” (i. e. that which has been lost), and “*uddharet*” (i. e. if he rescue or win back). (c) Though there is no explicit rule which enables a member of a united family purchasing a portion of the patrimony, formerly sold, out of his separate means, to enjoy it, as in the case of another acquisition, free from claims to partition by his coparceners, yet neither is any express limit set to such enjoyment, and it would probably now be held that such property stands on the same footing as any other purchased property of his separate estate. A contention to the contrary was abandoned in the case of *Gooroo Pershad Roy et al v. Debee Pershad Tewaree*, (d) and a case at 2 Str. H. L. 377, with the comments of Messrs. Colebrooke and Ellis, shows that “*recovered property*” is of the nature of that which should have been, but could not be, divided, owing to its detention by strangers. The views here expressed are substantially repeated in the case of *Visalatchi Ammal v. Annusamy Sastry*. (e) The introduction of the condition of acquiescence on the part of co-sharers is due

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(a) S. A. No. 534 of 1864, decided 20th September 1864.

(b) Roer and Montriou translate “*purloined*.” Yājñ. II. 119.

(c) In answer to Q. 585 MSS. the Śāstri said that when a Vatan had been granted to one brother, resumed in part on his death, but recovered by the other brother, it did not become the property of the undivided family to which he belonged.—*Dharwar*, 24th February 1848. This agrees with the view taken by the P. C. in the *Shivagunga* case. Comp the cases above, p. 158, notes (g) and (h).

(d) 6 C. W. R. 58 C. R.

(e) 5 M. H. C. R. 150, see also *Muttu Vaduganadha Tévar v. Dora Singha Tévar*, I. L. R. 3 Mad. at p. 300, and *Naraganti Achammagaru v. Venatalapathi*, I. L. R. 4 Mad. at p. 259.

probably to the necessity of guarding them against any underhand proceeding by one of their number. (a) Recovered property, it has been held, does not include what is regained from one claiming as a member of the family; but only property held adversely by strangers; and one, who, in a suit brought by him against a stranger, purposely ignores his co-heir, is not entitled to any extra share. (b) Ancestral moveables, recovered by a coparcener, without the use of the patrimony, but with the consent of the co-sharers, become his separate property.

The author of the *Mitāksharâ* has quoted Manu IX. 209 in support of his view of the father's independent power over ancestral property recovered by him. His explanation of the passage, though differing in terms, agrees in substance with that of Manu's Commentator Kullūkabhaṭṭa. The translation of Sir W. Jones does not correctly render the sense of Manu's words, inasmuch as he has translated the word *putraih*, "with his sons," by "with his brethren." While the family is undivided, however, the acquisitions of its several members are usually made by the aid of the common property and unite with it. Hence a presumption arises of all the possessions of the several members being joint estate subject to distribution like ancestral property. In *Dhurm Das Pandey v. Musst. Shâma Soondri Dibiah*, (c) the Judicial Committee say:—"It is allowed that this was a family who lived in commensality, eating together and possessing joint property. It is allowed that they had some joint property, and there can be no doubt that, under these circumstances, the presumption of law is that all the property they were in possession of was joint property, until it was shown by evidence that one member of the family was possessed of separate property." That this applies when the transac-

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(a) 1 Str. H. L. 217.

(b) *Bissessur Chuckerbutty et al v. Seetul Chunder Chuckerbutty*, 9 C. W. R. 69 C. R.

(c) 3 M. I. A. at p. 240.

tions of a father are in question is shown by *Suraj Bunsee Koer's* case (a) and many others. The case is consequently almost unknown in practice of a father's uncontrolled power being asserted on the ground of recovery referrible solely to his own exertions or fortune.

§ 5A. 3.—*Self-acquired property*.—*Acquired*, as distinguished from *inherited* or *recovered*, property, has a two-fold character as being the acquisition

- a. Of a father, head of a family, and
- b. Of any other coparcener.

§ 5A. 3. a. Self-acquired property, as between a father and his sons, includes all separate acquisitions by the father, such as a grant of a village as an inam, (b) as well as

(a) Above, p. 609.

(b) *Bahirji Tannaaji v. Odatsing*, R. A. No. 47 of 1871, Bom. H. C. P. J. F. for 1872, No. 33.

The following cases connected with grants of land may be useful as showing when the grantee has, and when he has not, a full power of disposal.

A grant to a man, his children and grandchildren, confers an absolute estate, *Tagore* case, 4 B. L. R. 182 O. C., and if to a gift are added "words restricting the power of transfer which the law annexes to that estate, the restriction would be rejected [as a] qualification which the law does not recognize." *Tagore* case, 9 B. L. R. 395, quoted by the Judicial Committee in *Bhooban Mohini Debya v. Hurish Chunder Chowdrey*, L. R. 5 I. A. at p. 147. (Comp. Laboulaye, Prop. Fonc. en. Oc. 368.) As to the extent of the property conferred by a grant in Bombay, see *Waman J. Joshi v. The Collector of Thana*, 6 Bom. R. 191 A. C. J., and *Nagardas v. The Conservator of Forests*, I. L. R. 4 Bom. 264; *Bayaji v. The Conservator of Forests*, P. J. 1880, p. 342. In *Jamna Sani v. Lakshmanrao*, Bom. H. C. P. J. 1881, p. 6, it was said that ordinarily the holder of a jaghir or saranjâm can make a valid grant only for his own life; and the Government having defined an estate previously granted as a saranjâm, and untransferable from the family meant to be benefited, a subsequent alienation to a stranger was pronounced invalid as against the grantor's heirs. In *Nagardas' case* (*supra*) it was held that an Izafatdar's title does not necessarily involve any proprie-



ancestral property recovered and property taken by inheritance, but not in the direct male line of descent. (a) The acquisition or recovery must have been made without the aid of the family estate; otherwise the property will rank as ancestral. (b) In the *Mitáksharâ* this qualification is not distinctly drawn out. The general rule only is laid down, that sons become by birth participators in both the property inherited by their father and the property by him

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tary right, and that even though a Khot may be a proprietor yet this is not implied in his "Khoti" office or grant, so as to make him owner of timber growing on the village lands subject to his authority.

When a grant has once been made by the Government, or a sanad has been granted settling the land tax under Bombay Act VII. of 1863, the executive cannot reform or annul it, *Dholsang Bhavsang v. The Collector of Kaira*, I. L. R. 4 Bom. 367. If the settlement has been made with a person not the rightful owner, the owner is bound by it, but he may recover the property subject to the settlement from the possessor holding the sanad as from a trustee. On the other hand the grantee, (an inamdar,) is strictly bound by the terms of his grant from the sovereign power, *see above* p. 173, 441. Unless expressly empowered by his grant he has not a right to enclose land used immemorially as pasture ground by the inhabitants of a village, *Vishwanâth v. Mâhâdâji*, I. L. R. 3 Bom. 147.

In *Collector of Surat v. Ghelabhoy Nârandas*, 9 Harr. 603, the State taking by escheat an estate granted free of service was held bound by a mortgage effected by the last deceased inamdar. *Comp. Râja Salig Ram v. Secretary of State*, L. R. Supp. I. A. 119, 129. As to a grant by a Zamindar, *see Raja Nursingh Deb v. Roy Koylasnath*, 9 M. I. A. 55. *See Steele*, L. C. pp. 207, 237, 269.

(a) *See above*, p. 710 ss.

(b) In the common case of a purchase by the father out of funds separately acquired by himself of property in the name of his son, the presumption is not as under the English law of an intended advancement of the son, but of a purchase, *benami* (i.e. without his name or in another name) for the father himself, *see Naginbhai Dayabhai v. Abdula bin Nasar*, I. L. R. 6 Bom. 717. The auspicious fortune of the son is thus sought to be attached to the acquisition and a unity of interest is generally recognized in feeling even when not acknowledged as a legal obligation. "By the *Mitáksharâ*

acquired, (a) and that the right of sons and grandsons in the grandfather's estate is equal, without any express provision for accumulations or increments of the estate. The section (4 of Chapter I.) which treats of property not subject to partition, since it lays down no explicit rules regarding acquisitions made by a father, might be taken as relating only to independent or equal coparceners, such as brothers or collaterals. But in the *Mayākha*, Chap. IV. Sec. 4, para. 5, (b) the text of *Manu*, which excludes property recovered by a father from ancestral property, is modified by a text of *Bṛihaspati*, which declares that such recovery must take place through the father's own ability [and without the use of the patrimony]. The effect would seem to extend to the case of separate acquisitions made by the father with the aid of the ancestral estate. In *Sudanund Mohapattur v. Bonomallee et al*, (c) quoted in *Sudanund Mohapattur v. Soorjamonee Debee*, (d) it was said that ancestral property did not include that purchased out of the income; but this has been overruled. (e)

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law..... the son has a vested right of inheritance in the ancestral immoveable property.....the ancestral property is only that which is actually inherited, and not that which has been acquired or recovered, even though it may have been acquired from the income of the ancestral property, for the income is the property of the tenant for life to do as he likes with it,"—the judgment, overruled at 8 C. W. R. 456 (*Sudanund Mohapattur v. Soorjomonee Debee*), was subsequently held to be *res judicata* between the parties and decisive of *Chakardhur's* right to dispose of acquisitions out of profits, *Soorjomonee Dayee v. Saddanund Mohapatter*, P. C. 20 C. W. R. 377 S. C., L. R. S. I. A. 212, though the correct doctrine is upheld in *Umrithnath Chowdry v. Goureenath Chowdry et al*, 13 M. I. A. 542.

(a) *Mit.* Chap. I. Sec. 1, pl. 27; *Stokes*, H. L. B. 375; Sec. 5, p. 10; *ibid.* 393.

(b) *Stokes*, H. L. B. 48.

(c) 1 *Marshall*, 317.

(d) 8 C. W. R. 456 C. R.

(e) C. W. R. 1. c., and *Sudanund Mohapattur v. Bonomallee Doss*, 6 *ibid.* 256 C. R.

§ 5A. 3. b. Self-acquired property, as between coparceners generally, includes gifts of friends, or at marriage, gains of science, valour, and chance, obtained by one or some of the coparceners apart from the others (a) without the use of the family property. (b) If in the acquisition of property directly gained by science, valour, &c., the result is in a considera-

(a) See *Radhabai v. Nanarao*, I. L. R. 3 Bom. 151. An inam resumed by the Government and afterwards bestowed on a single member of the family was held to be self-acquired by him, *Kristniab v. R. Panakaloo*, M. S. D. A. Dec. for 1949, p. 107. This agrees with the *Shivaganga* case, 9 M. I. A. 609. In Bombay the resumption of an inam in the sense of reimposing the land-tax on the death of the inamdar was held not to create a new estate. The encumbrances created by the inamdar were held still to subsist as against his representatives, *Vishnu Trimbak v. Tatiá*, 1 Bom. H. C. R. 22. Comp. p. 158, *supra*.

(b) Mit. Chap. I. Sec. 4, paras. 1-15, Stokes, H. L. B. 384-7; May. Chap. IV. Sec. 7, paras. 1-14, *ibid.* 73-77; *Nahak Chmd v. Ram Narayan*, I. L. R. 2 All. 181. Property acquired by use of inherited funds is joint, *Musst. Mooniah et al v. Must. Teekneo*, 7 C. W. R. 440, and from union a presumption arises of all property being joint, *Taruck Chunder Poddar et al v. Jodeshur Chunder Kondoo*, 11 B. L. R. 193; *Gopeekrist Gosain v. Gungapersaud Gosain*, 6 M. I. A. 53; *Neelkisto Deb v. Beerchunder Thakoor*, 12 M. I. A. 540. When two brothers lived together without paternal estate and acquired land chiefly through capital supplied by the elder and improved it by their joint exertions, the younger suing for a moiety was awarded one-third, *Koshal Chukurwutty v. Radhanath Chukurwutty*, 1 Calc. S. D. A. Rep. 335. But conveyances in a single name and prolonged separate enjoyment raise a presumption of separate acquisition, *Gurá-chárya v. Bhimáchárya*, S. A. No. 223 of 1876, Bom. H. C. P. J. F. for 1876, p. 241.

In the Dera Ghazi Khan District it is noted that gifts from a father-in-law or maternal grandfather are excluded from partition, Panj. Cust. Law, Vol. II. p. 261.

With the gain by valour may be compared the Roman law on that subject. Gaius says—"Ea quoque quae ex hostibus capiuntur naturalí ratione nostra fiunt," Lib. II. Sec. 69. He links this with the doctrine of title by first occupation. The right to the peculium castrense was specially constituted as against the patria potestas, see Juv. Sat. XVI. 51.

ble proportion evidently due to the use of the family estate, an equitable distribution of such acquisition between the family and the separate estates, should, it appears, be made. (a) Such seems to be the effect, when interpreted according to the reason of the law, of the text of Vasishṭha, cited Mit., l. c., para. 29, on which see Mr. Ellis's remarks quoted at 2 Str. H. L. 383. (b) The difficulty as to the relation of Mit., Chap. I. Sec. 4, para. 29 to para. 31, (c) may be solved with Mr. Colebrooke and Sir T. Strange by regarding the former paragraph as referred to a *wholly separate acquisition*, obtained by the aid of the family property, whereas the latter refers to augmentations, blending

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(a) The distribution of property acquired by different parceners is to be in fair proportion to their contributions of labour and capital, *Krippa Sindhu Patjoshe v. Kanhaya Acharya*, 5 M. S. D. A. R. 335.

(b) Gains of science, through learning acquired while the gainer was supported by a stranger, are separate and self-acquired property. So is a reward for any extraordinary achievement. But all other acquisitions of an undivided coparcener are family property. Q. 594, Poona, 17th August 1849, and Q. 685 MSS; see also 2 Str. H. L. 374. But Jagannātha says, Coleb. Dig. Bk. V. T. 346 Comm.:—"The meaning is that wealth gained by superior attainment in any art or science belongs exclusively to him who acquired it." Sir William Jones, at 2 Str. H. L. 250, translates Manu apparently as recognizing separate property held by an undivided coparcener, and to be inherited by his widow, as distinguished from the doctrine of the Dāyabhāga, which makes her heir even in an undivided brotherhood, though with a right limited to mere enjoyment. At 2 Str. H. L. 346 is a case of a member living apart and acquiring separate property, but without any division; whom the Śāstri pronounced answerable for his brother's debt only if he had received assets. A *Śrotriya* grant for learned service was pronounced descendible to the grantee's sons only, to the exclusion of his brothers, *ibid.* 365. A village obtained without the use of the patrimony was pronounced separate property, *ibid.* 377.

The custom of London, which prescribed a particular distribution of a freeman's property, did not extend to his gains by the profession of chemistry or of medicine, 1 Vern. 61, Bac. Abtr. Customs. (C)

(c) Stokes, H. L. B. 390.

as they accrue with the original estate. (a) In *Colebrooke*, Dig., Bk. V., T. 354, 355, Jagannâtha seems to lay down that what is acquired without any aid at all from the patrimony is separate property; that what is acquired with such aid, whether previous or concurrent, is partible with the learned brothers; and that if the aid has been both previous and concurrent, the acquisitions are partible with all the brothers. In commenting on the text of *Vaśiṣṭha*, Jagannâtha (T. 356) says that aid from the patrimony includes supplies previously received out of it, and under T. 359 he assumes that the double share is in an acquisition made without using the patrimony concurrently or as capital. (b) In *Chala Condu Alasâni v. C. Ratnâchalam et al*, (c) the subject of the gains of science is discussed at great length, the conclusion being that such acquisitions, made by one supported and instructed at the expense of the family, form part of the joint estate. (d) In *Ramasheshaiya Panday*

(a) When the self-acquired property is so held that the profits blend with those of the ancestral, the whole is to be deemed a common stock, *Gooroo Churn Doss et al v. Gotuck Money Dossee*, 1 Fulton, 165, which is cited and followed in *Lakshman v. Jamnabai*, I. L. R. 6 Bom. 225. Where a distinction is possible a double share belongs to the acquirer, but this does not apply to a manager, who is bound to devote his abilities to the interest of the family, see above, p. 635.

(b) The case at 2 Str. H. L. 371 distinguished the three cases of (1) an augmentation of the common stock, (2) separate gains by the aid of the patrimony, in which the acquirer takes a double share, and (3) gains independently acquired and forming wholly separate property. "The common stock, however improved or augmented, is to be equally divided; but if separate acquisitions have been made to which the patrimony was instrumental the acquirer is rewarded with a double share. Separate gains of specified sorts to effect which the patrimony was not used would belong exclusively to the acquirer." *Colebrooke* in 2 Str. H. L. 371. As to the last class, see *ibid.* 374.

(c) 2 M. H. C. R. 56. To the same effect see *Durvasula Gangadhurudu v. Durvasula Narasammah*, 7 M. H. C. R. 47.

(d) This case is referred to in *Bai Mancha v. Narotamdas*, 6 Bom. H. C. R. 1 A. C. J., in which there was clearly a joint capital as the basis of acquisition by a single coparcener.

*v. Bhagavat Panday*, (a) it is said that any property acquired by a Hindû while drawing an income from the family is joint property. (b) In the case of *Lukhun Chunder Dallal*

(a) 4 M. H. C. R. 5.

(b) At 2 Str. H. L. 376, Sutherland questions Ellis's dictum that an education at the cost of the father makes subsequent gains divisible as family property. See also per Mitter, J., in *Dhunoopdaree Lall v. Gupat Lall*, 10 C. W. R. 122. In *Pauliem Valoo v. Pauliem Sooryah*, L. R. 4 I. A., at p. 117 (S. C., I. L. R. 1 Mad. at p. 261), the Privy Council say that the doctrine, favored in Madras and followed in Bombay (in *Bâi Manchhd v. Narotamdds*, 6 Bom. H. C. R. 1 A. C. J., involves "the somewhat startling proposition," that "if a member of a joint Hindû family receives any education whatever from the joint funds, he becomes for ever after incapable of acquiring by his own skill and industry any separate property." The member might acquire full capacity by a separation, but even without a separation his acquisitions should not, it appears, become, without distinction, joint property. Their distribution between the joint and the separate estates should, it would seem, be governed by the principles above set forth, as deducible on a just construction from the Smṛiti. See Manu IX. 208, as quoted in Mit. Chap. I. Sec. 4, pl. 10, Stokes, H. L. B. 387; Coleb. Dig. Bk. V. T. 347, 348. In the same case, it was held that the education of *B* out of the estate of his father *A*, that estate ranking as self-acquired property, was not an instruction at the cost of the joint estate, so as to make *B*'s property subsequently acquired joint as between him and his sons, *C*, *C*<sup>1</sup>, *C*<sup>2</sup>, &c., and thus raise a question as to the testamentary power with respect to it, exercised by *B* in favor of *C*<sup>1</sup>, *C*<sup>2</sup>, &c. to the exclusion of *C*. According to the Mitâksharâ and the Mayûkha, as construed above, Sec. 5A. 2 a. pp. 721, &c., the instruction of *B* at *A*'s expense would entitle brothers, if he had any, to share with him in gains directly attributable to the instruction, but it would make no difference as between *B* and *C*, *C*<sup>1</sup>, *C*<sup>2</sup>, &c., whether *A*'s property was ancestral or self-acquired, see Mit. Chap. I. Sec. 5, pl. 3; Stokes, H. L. B. 391. The question would be whether the acquisition of property by *B* was or was not substantially founded on what he took from *A*, or held jointly with *A*, so as to make *C*, *C*<sup>1</sup>, *C*<sup>2</sup>, &c. joint owners on *A*'s death. See Nârada, Pt. II. Chap. XIII. paras. 6, 11; Mit. Chap. I. Sec. V. para. 3; Viram. Tr. p. 68; the Dânyabhâga, Chap. VI. Sec. 1, para. 16 note, Stokes, H. L. B. 269; Coleb. Dig. Bk. V. T. 354 Comm. *ad fin*, and T. 379 Comm.; *supra*, Bk. II. Intro. Sec. 5 A, 1A.

*v. Modhoo Mockhee Dossee*, (a) it was ruled that an allegation of separate acquisition by the use of a gift must be proved, and in *Dhurm Dos Pande v. Musst Shama Soondri Debia*, (b) that when property has been acquired by a coparcener in his own name, the criterion for determining its character is the source of the funds employed. (c).

In *Lakshman v. Jamnabai* (d) it was said after a review of the previous decision: "We think that we shall be doing no violence to the Hindû texts but shall only be adapting them to the condition of modern Hindû society, if we hold that when they speak of the gains of science which has been imparted at the family expense they intend the special branch of science which is the immediate source of the gains and not the elementary education which is the necessary stepping-stone to the acquisition of all science. Adopting this principle and applying it to the present case we find, as we have said, that there is no reason to suppose that Dayâram acquired at Dharwar and Belgaum anything more than a rudimentary education. We see no reason to doubt that the knowledge of law and judicial practice which qualified him for the post of a Judge was acquired by him in a lawyer's office in Bombay and in the Sadar Adawlat. Assuming that the burden of proving that this knowledge was acquired without any aid from the family estate lies upon the respondent (though the observations of the Privy Council in *Luzimon Row Sudasew v. Mullar Row Bajee*, 2 Knapp 60, tend to the opposite conclusion), we find sufficient in the evidence, and especially in the earlier letters written by Dayâram from Bombay, to show that Dayâram was not receiving pecuniary aid from his father, but on the contrary was supplying his

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(a) 5 C. W. R. 278 C. R.

(b) 3 M. I. A. 229.

(c) "Unequal gains.....using for the purpose the family property make no difference upon partition. It must still be equal." This dictum of the Śâstri is approved by Colebrooke, 2 Str. H. L. 313, who quotes Mit. Chap. I. Sec. 4, p. 31 (Stokes, H. L. B. 390).

(d) I. L. R. 6 Bom. 225, 243.

father with such money as he could spare." The Court accordingly confirmed the decision of the Subordinate Judge that Dayáram's estate was to be regarded for purposes of inheritance as separate and self-acquired. The decision rests generally on the principles above set forth, and shows that acquired property does not rank as joint where there is not really an obligation of the acquirer to the family going beyond mere ordinary sustenance and rudimentary education. Whether there had been some aid from the family such as to limit Dayáram's right to a share double that of his brother however was a question not raised, it would seem, in the case. (a)

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(a) For the presumptions which arise when amongst parceners separate acquisition is asserted by some and denied by others, see the cases of *Laxmanrav Sadasev v. Mulharrav*, 2 Kn. 60; *Dhuramdas Pandey v. Musst. Shama Soondri*, 3 M. I. A. at p. 240; *Gopeekrist Gosain v. Gangapersad Gosain*, 6 M. I. A. 53; *Neelkisto Deb Burmano v. Beerchundur Thakoor*, 12 M. I. A. 540; *Bodhsing Doodhomia v. Ganesh Chundur Sen* (Pr. Co.) 12 Beng. L. R. 117; *Amritnath Chowdry v. Gowreenath Chowdry*, 13 M. I. A. 542; *Tamek Chunder Poddar v. Jodeshar Chundur Koondoo*, 11 Beng. L. R. 193; *Bholanath Mahta v. Ajoodha Persad Sookul*, 12 B. L. R. 336; *Dinonath Shaw v. Hurrynarain Shao*, 12 B. L. R. 349; *Gobind Chundur Mookerjee v. Doorgapersad Baboo*, 22 C. W. R. 248; *Vishnu Vishwanath v. Ramchandra*, Bom. H. C. P. J. 1883, p. 53. The principal cases are discussed by Scott, J., in *Mooljee Lilla v. Goculdas Valla*. The learned judge is brought back as the result to the texts of Manu IX. 268, and the Mitaksharâ, Chap. I. Sec. IV. para. 10, already referred to.

Parceners claiming a share in property acquired by others must prove that the latter received aid from the paternal estate, according to *Cahotty Pillai v. Yella Pillai*, 1 M. S. D. A. Dec. 148, and the burden has been similarly laid in several of the more recent cases above referred to. But the presumption in a united family is of continued unity of estate. See *Musst. Cheetha v. Miheen Lall*, 11 M. I. A. 369, though the presumption is one easily displaced by facts indicating a separate and substantially independent acquisition. In *Musst. Bamnoo v. Kasheeram*, I. L. R. 3 Calc. 315, the Judicial Committee would not allow it to prevail, though in some property there had been an hereditary joint estate. The circumstances of the family it was said rebutted the ordinary presumption. See now



§ 5 B. *Property naturally indivisible*.—Naturally indivisible property is that which cannot be distributed retaining its essential characteristics. (a) In the Hindû law there are enumerated common roads or ways, tanks, wells, pasture-ground, (b) hereditary offices (*vṛitti*, *vatan*), religious and charitable dedications (*yoga-kshema*), as endowments and reservoirs for travellers, (c) clothes in use, books, tools, ornaments, vehicles, and furniture. (d) To these may

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Ind. Ev. Act, Secs. 4, 114, and the observations of Phear, J., at 12 Beng. L. R. 342 ss.

(a) See Ellis in 2 Str. H. L. 329.

(b) Steele, L. C. 223. Amongst the ancient Irish, the forests, bogs, and wastes remained undivided after a general partition. So in the German Markgenossenschaft, the mass of the land was held jointly, while his house and enclosure were held by the individual owner.

(c) *Vīram*. Tr. p. 249. The Dharwar Śāstri (30th June 1848) says that a Bhaṭ's *vṛitti* and a Zamindār's *vatan* are alike divisible according to Bṛihaspati, Q. 643 MSS. See Steele, 218, 228; *Vīram*. Tr. p. 3, and above, p. 411. The books of genealogies of the periodical pilgrims to places like Nasik are on a division of the family distributed amongst the members of the priestly families, who thenceforward have an exclusive interest in the families allotted to them. Steele, L. C. 85.

(d) 2 Str. H. L. 370; Coleb. Dig. Bk. V. T. 362, 474 Comm.; Mit. Chap. I. Sec. 4, para. 19; May. Chap. IV. Sec. 7, para. 15, Stokes, H. L. B. 77; Mit. Chap. I. Sec. 4, paras. 17—20; *ibid.* 388. In para. 20, "If they cannot be divided, the number being unequal, they belong to the eldest brother," means that the indivisible remainder goes to him. This is the interpretation of the Subodhini, and is supported by the text of Manu, quoted by Vijnāneśvara. Goldstücker (On the Deficiencies, &c.) thinks that Jones and Colebrooke were wrong in their translation, and that in the case of an unequal number of cattle, no partition at all could be made, but their construction is as grammatical as that of their learned critic, and more reasonable and convenient. Mit. Chap. I. Sec. 4, para. 19.

According to the borough-English custom the family dwelling (called *astre* or *hearth*) was reserved to the youngest son. See Eit. Tenure of Kent, 173. Under the ordinary law to the eldest, Glanv. VII. 3.

be added indivisible rights arising from obligations contracted towards the common ancestor, or towards the family, whilst in a state of union. (a) Vyāsa includes the dwelling in indivisible property. (b) The Vyav. May. (c) explains this away in a very confused manner. The passages seem to point to the sacredness under the antique law of the house and its curtilage. (d)

(a) See Colebrooke on Oblig. Art. 433; Pothier, Obl. Art. 294; *Musst. Ameeroo Nissa Bibee v. B. Otool Chunder et al*, 7 C. W. R. 314 C. R.; *Dewakur Josee et al v. Naroo Keshoo Goreh*, Bom. Sel. Ca. 215.

(b) Coleb. Dig. Bk. V. T. 354; so also Śankha and Likhita, T. 362.

(c) Chap. VI. Sec. 7, p. 21; Stokes, H. L. B. 78.

(d) The family estate, once regarded as inalienable, a quality extending even to acquisitions by acceptance of religious gifts, (see Viram. Tr. p. 99, above p. 138,) next became disposable by the joint will of all interested. In *Lallubhai v. Bai Amrit*, I. L. R. 2 Bom. at p. 328, the progress from this stage through the allowance of religious gifts to freedom of sale is traced by reference to the Hindū authorities. When the separate performance of the family sacrifices by brothers residing apart once became recognized as a right, and then as a duty, the close connexion between the sacra and the estate made a law of partition almost inevitable. Still the ancient habits and traditions made this a slow growth. Union under the eldest (Manu IX. 106) must long have remained the sacred type of the family, until the progress and increase of the other castes invited the Brahmans, the sole legislators of the codes, to dispersion, and to the encouragement of dispersion amongst their clients for the multiplication of religious functions. It seems from such Smṛitis as the one quoted, Mit. Chap. I. Sec. 1, para. 30, that the partition of the immoveable patrimony was regarded, when first allowed, rather as a distribution for use than a division of interests. To this may be ascribed some apparent contradictions of precept. Thus, notwithstanding a partition, the concurrence of all the co-sharers, though separated, was required for the gift or sale of any part of the ancestral lands, Steele, L. C. 239. To this may probably be traced the right of pre-emption amongst members of the same stock recognized by some local usages of the Hindūs. The right recognized amongst Hindūs in Gujarāth has been referred to a Mahomedan origin, *Gordhandās v. Frankor*, 6 Bom. H. C. R. 263 A. C. J., and in Bengal, B. L. R. F. B. R. 143, but a Gujarāth Śāstri referred it to the prohibition against

In the case of *Mangala Debi et al v. Dinanath*

alienation of the family estate, MS. Q. 746. See Steele, L. C. p. 211; and comp. Tupper, Panj. Cust. Law, Vol. III. p. 147.

The Mitāksharā, written after the sacred and perpetual unity of the patrimony had passed away, says that the concurrence of one separated kinsman in the sale of his land by another is required only to prevent future dispute, but this utilitarian reason for the continuance of the rule was obviously not the source of it. The Smṛiti regard the patrimonial lands generally as indivisible. Thus Uśānas, (in Mit. Chap. I. Sec. 4, pl. 26, Stokes, H. L. B. 390, Smṛiti Chandrikā, Chap. VII. para. 44), says that land and sacrificial gains are wholly impartible. Prajāpati (para. 46) is to the same effect. (See also Smṛiti Chandrikā, Chap. XII. para. 21). He says that the assent of every coparcener is requisite to the validity of any act, touching the immoveable property. Unanimity amongst the sharers was perhaps meant by Prajāpati to warrant partition and even alienation, as Yājñavalkya also (para. 49) says, "No one can make a partition of the inheritance. It must be enjoyed merely, not aliened by gift or sale," and yet he lays down rules for partitions. (Yājñ. II. 114, &c.) The text of Brihaspati quoted in Mit. Chap. I. Sec. 1, para. 30 (Stokes, H. L. B. 376, and Smṛiti Chandrikā, Chap. XV. para. 3), "A single person (even separated) never has power over immoveables," though differently explained by the modern commentators, points back to the same primitive notion. The differences of custom which have spring from this may be seen in Steele, L. C. 238.

The ancient rule of the Hindū Law which forbade sale but allowed mortgage of the inheritance, Mit. Chap. I. Sec. 1, para. 32, was the basis of the law of Kānarā, whereby a mortgagee who had entered on default was compelled, after any lapse of time, to restore the property on payment of the debt with interest and compensation for improvements. See 5th Rep. 130. So too the occupier of vacant land deserted by its owner had to restore it on his return with or without compensation for his expenditure, see *Bhāskarāppā v. The Collector of North Kānarā*, I. L. R. 3 Bom. 525 ss. A similar law, resting on the same ideas, is still operative in the Panjāb, though there, as elsewhere, restrictions are creeping in, see Tupper, Panj. Cust. Law, Vol. III. p. 145-150; and the same, Vol. I. p. 93, 94; Vol. II. p. 214, for the right asserted by village communities over the common land, and Vol. II. p. 8 ss. for the tribal origin of property in land and the derivative constitution of the family and individual ownership, contrary to Sir H. Maine, Early Hist. of Inst. pp. 77-82.

*Bose, (a)* Sir B. Peacock, C. J., refers to Kâtyâyana, as

Amongst the Garos all land is held in common by a Mahari or clan.....It can be aliened only by common consent. Damant in Ind. Antq. Vol. VIII. p. 205. In the Delhi territories, according to native custom, "a sharer cannot dispose of his landed property by sale or gift nor introduce a stranger without the general acquiescence of the pane or thola or other division to which he belongs," his co-members of the community having also a right of pre-emption. Mr. Fortescue's Rept. of 28th April 1820, III. R. and J. Sel. 404. In Lahore sales of land are not recognized, while usufructuary mortgages are common, Panj. Cust. Law, Vol. II. p. 187. The consent of townsmen and neighbours (*see* Coleb. Dig. Bk II. Chap. IV. Sec. 2, T. 183), referred to in Mit. Chap. I. Sec. 1, p. 31 (Stokes, H. L. B. 376), may have been required on account of the joint enjoyment of the common pasture land appendant to the holding, and of the close connection and community of interest of the several members of the ancient village. They were dependent on each other for many services and subject to taxation in common. It was natural then that the relatives first and then co-villagers should have a preferential right to vacant lands. *See* Proc. Beng. Soc. Sc. Assn. Vol. I. p. 31. The consent of the Mirâsdârs is said by Ellis (*Madras Mirasi papers*, pp. 206, 207) to be necessary for the admission of an outsider to ownership either of a share in the integral property in the village, or of a particular portion of the land. The form of such assent is retained in many modern grants, such as that under Tippoo's Government, set forth at Vol. I. p. 73, of the Evidence in the Kânarâ Land Case, which, it is said, is made "with the consent of the Desâis, Gârkaris, Bhâvas, and Potbhâvas of the village." Sales were formerly attested in many cases by the whole village community, *see* Wilks, South of India, Vol. I. p. 132. *See* further Laveleye's Primitive Property, p. 60; Stubbs. Const. Hist. Vol. I. pp. 95, 96; 5th Rep. on E. I. Affairs (1812), Vol. II. p. 136, 826; and Mountst. Elphinstone's Hist. of Ind. Vol. I. p. 126; Maine, Anc. Law, Chap. VIII. p. 263.

The endeavour to preserve the land to the family to which it was originally allotted formed part of the polity of many of the Grecian States. The famous Agrarian law of the Jews had the same object in view, *see* Milman, Hist. of the Jews, Bk. V. Vol. I. p. 231. The Teutonic laws generally prohibited alike female succession, which might deprive the community of a defender, and the alienation of the patrimony without the consent of all the sons, or as in Sweden of all

(a) 4 B. L. R. 72 O. C. J.

quoted in Coleb., Dig. Bk. II. Chap. IV., T. 19, to show that an adopted son cannot, by selling the family house, deprive his adoptive mother of her right to a residence in it. This was followed in *Gauri v. Chandramani*, (a) where the purchaser at an execution sale of the rights of a nephew was successfully resisted, as to one-half of the family dwelling, by the widow of the judgment-debtor's uncle. And recently it has been held that the widow of an undivided Hindû has a right to residence in the family dwelling-house and can assert it against the purchaser of the house at a sale in execution of a decree against another member of the family. (b)

As regards clothes, furniture, vehicles, ornaments, books, and tools, it must be understood that an equitable distribution (c) of them or of the proceeds of their sale is sanctioned, when they are numerous and of value, or form the sole property of the family. As to ornaments it is said that those commonly worn by a woman during her husband's life are not subject to partition, after his death, by his coparce-

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members of the family except in case of extreme necessity. Captivity was such a case, and at a later time overwhelming debt. A right of retraction subsisted for a year. See Maine, *Anc. Law*, Chap. VI. p. 198; *Lex. Salica*, Ti. 62, Sec. 6; Baring Gould, *Germany, Past and Present*, Vol. I. p. 74. In Sweden, as in India, the right of occupation of waste was at one time unrestricted except by the liability to taxation, but this latter was in both countries expanded into a right or claim to superior ownership; see Geiger, *Hist. of Sweden*, Chap. IV; *Bhaskarâppâ v. The Collector of North Kânará*, I. L. R. 3 Bom. 540, 544 ss. In Norway an indefeasible right of redemption was always recognized; *Elt. Orig.* p. 209.

(a) I. L. R. 1 All. p. 262.

(b) See Bk. I. Chap. I. Sec. 2, Q. 9; *Talemand Singh v. Rukmina*, I. L. R. 3 All. 353; *Parvati v. Kisansing*, Bom. H. C. P. J. 1882, p. 183. See above, p. 252. According to the custom of London and other places under the English law, "while the house went to the youngest heir, the chief room was reserved as the widow's chamber." See *Elt. Tenure of Kent*, 42.

(c) *May*, l. c., paras. 22 and 23; *Stokes*, H. L. B. 78-9; *Mit. Chap. I. Sec. 4*, paras. 17-19; *ibid.* 388. Otherwise they are retained by the possessors, allowance being made for their value; *Steele*, L. C. 60, 223.

ners, (a) they and are expressly excluded from partition in the husband's life by Vishnu, XVII., p. 21, unless given in fraud of the coparceners. (b) Property subject to partition, but the existence of which was not known and which could not therefore be included in a general partition, is, on its discovery, to be distributed, and in the same proportion as that actually divided. (c)

§ 5c. *Property legally impartible*.—Property, not naturally indivisible, may be impartible on account of the political condition of the owners or of a local or family law governing its devolution. (d) The succession to a principality is by the Hindû Law usually confined to a single line of chieftains. (e)

(a) Viram. Transl. 250 ; *Infra*, Bk. II. Introd. Sec. 7 A. 2. A widow's ornaments are not partible amongst her husband's coparceners, Steele, L. C. 35. See above, p. 310.

(b) See above, pp. 186, 208, 310. (c) Steele, L. C. 60, 223.

(d) See Coleb. Dig. Bk. II. Chap. IV. T. 15 Comm. ; Maine, Anc. L. 233. Under the Maroomakatayam law a partition requires the assent of all members of the family, M. S. D. A. R. for 1857, p. 120. Under the English Common Law cases arose of coparceners inheriting property, such as a fortress, a corody uncertain, or common appendant which could not be divided. In such cases the eldest took the impartible property and made an equivalent contribution in money to the others. So too when the youngest coparcener took the whole of the impartible property under the law of borough-English. See Bract. II. 76 ; Co. Litt. 165 a ; Elt. Tenure of Kent, 172.

(e) Steele, L. C. 60, 62, 229 ; 1 Macn. H. L. 7 ; 2 Str. H. L. 328. The custom arose, or maintained itself amidst a general change, partly from the sacred character ascribed to the eponymous founder of a line of chieftains and his descendants retaining power or nearly connected with those who held it ; partly, too, under the pressure of necessities such as those which gave rise to a similar rule in the Feudal system. Before this had become developed we find the sons of Clovis dividing the empire (Coulanges, Hist. Inst. p. 427) under the Salic law (Hessels and Kern, 379 ss.) like a private estate. In England, before the Norman conquest, the succession to the throne, though confined to a single family, was determined, as to the individual, by election, a method which, unless the electors as well as the person chosen belong to the princely family, is not consonant to Hindû ideas of chieftainship. Feudal tenure required a defined and single successor to the fief. But in Germany, where allodial

The preference of individual members of the reigning family may be governed by a simple rule of primogeniture (a) and exclusion of females; it may admit of collateral representatives coming in under particular circumstances; or a power of selection of the heir apparent from a larger or a smaller class may be exercised by the chief in possession or after his death by a group of chiefs. (b) Such rules recognized as controlling the succession in a State are hardly to be classed with those of the ordinary municipal law. They can but seldom come under the cognizance of the ordinary Civil

patrimony was often held along with the fief, the former was distributable as under the Hindû law, though the latter was impartible, at least from the 14th century downwards. The rule of primogeniture established as to their fiefs amongst the electors by the Golden Bull of Charles IV. was imitated generally by the princely houses as a family law, while partition was still the general law. See Freeman, *Hist. of Norman Conquest*, Vol. I. 107; Maine, *Early Hist. of Inst.* 199 ss; Baring Gould, *Germany*, Vol. I. 78, 79; *Rawut Urjun Singh v. Rawut Ghunsiam Singh*, 5 M. I. A. 169; *Chowdhry Chintamon Singh v. Musst. Nowlukho Koonwari*, L. R. 2 I. A. 263.

(a) Notwithstanding the almost universal acceptance of the law of equal divisible ownership of the patrimony by several sons and their descendants, the traces of the older system of a theoretical permanence of union under a single head are still perceptible. See Steele, L. C. 62, 205, 215, 228, 229, 230, 375, 409, 417. The "vadiiki" or eldership of a family of vatandars (hereditary functionaries) is still often contested with great acrimony, and that too when the rights or privileges annexed to the position are, according to an English estimate, of but the most trivial value, or of no value at all. The question between the grandson by a deceased elder son and a surviving younger son, and between the representatives of the eldest branch and of the branch nearest to the last holder gave rise in England and in Germany to contests like those which have arisen in India, see above p. 69, note (b), and Comp. Reeves, *Hist. of Eng. Law*, Chap. III. The Wars of the Roses sprang from an analogous dispute. In Germany the determination of the competing rights of the elder and the younger branch passed the skill of the lawyers and was committed to a single combat of champions. See Glanv. by Beames, p. 158; Meyer, *Inst. Judiciaires*, Vol. I. p. 344; Laboul. *op. cit.* 420.

(b) As to the tribal limitations and the customs of succession in Rājputānā, see Sir A. C. Lyall's *Asiatic Studies*, p. 200 ss.

Courts, (a) the sanction requisite to enforce the decision as to a disputed succession, an appanage, or a maintenance, being in general an act of State. The analogy only of the ordinary law is usually followed, because this, forming a part of the popular consciousness, has moulded the natural expectations and the standard of propriety existing in the princely family and those connected with it. The custom of the family has equal or even greater influence, and its enforcement by the paramount power (b) rests ultimately on the same considerations as those which give weight to the ordinary Hindû law, the desire to satisfy the general sense of right. (c) The usage does not affect newly-purchased zamindaries. (d)

The primogeniture of the ancient Hindûs was much more a headship than an ownership excluding the other members or branches of the family. (e) The head was an administrator for all, and a master of all, because the refinements of more

(a) See *Rajkumar Nobodip Chundro Deb Burmun v. Rajah Bir Chundra Manikya et al*, 25 C. W. R. 404, 12 M. I. A. 523 (the Tipperah case).

(b) *Mootoor Engadachellasamy Manigar v. Toombayasamy Manigar*, M. S. A. Dec. 1849, p. 27; Steele, L. C. 229. The character of the grant determined the rights as to inheritance and partition of an inam or jaghir. See Steele, L. C. 207; above pp. 157, 173.

(c) See *Neelkisto Deb v. Beer Chunder Thakoor et al*, 12 M. I. A. 523; *Maharaj Kuwar Busdev Singh v. M. Roodur Singh*, 7 C. S. D. A. R. 228; Coleb. Dig. Bk. II. Chap. IV. Sec. 1, T. 15 Comm. In Germany the property of the nobility "of the nature of a *râj*" is subject to various special rules of descent, having for their object the preservation of each estate as a support for the title. Besides primogeniture there are the rules of Majority, of Seniority, and of Secundo- and Tertio-geniture. For an explanation of these terms, the last of which implies the enjoyment of an appanage for life by a junior member of a family, according to a rule common in India, see Baring Gould, Germany, I. 81. Rules analogous to those of Majority and Seniority are to be found in operation in many States and Chieftainships.

(d) *Jagunnadharow v. Kondarow*, Mad. S. D. A. Dec. for 1840, p. 112; 3 Morl. Dig. 188.

(e) Above, pp. 69 ss.; Steele, L. C. 178, 228.



recent times had not been invented. At this stage of social development the idea of purely individual proprietorship was but growing up through the separate possession of moveables. (a) When the breaking up of families had been received into the legal system the former supremacy of the senior was recognized by the allowance to him of a greater portion or of some special parts of the estate, perhaps as an inducement to consent to a partition, (b) but probably also on account of the duty specially devolving on him of maintaining the sacra. (c) Precedence in public religious ceremonies, though sometimes burdensome, is still much prized by Hindû gentlemen, and has kept the minds of the people familiar with the idea of supremacy in families and individuals (d) notwithstanding the difficulty of reconciling the latter with the doctrine of equal rights acquired by birth. For ordinary public functions and the emoluments attending them, the generally received principle is that of a rotation of enjoyment amongst those entitled, (e) and this affords a means of transition, through cases where there must be some precedence, to an hereditary and singular succession to more exalted stations. (f) Both sets of ideas are at work in regulating the customary inheritance of the so-called "râj-es" of the present day, while the younger members of the territorial families claim appanages as of right in virtue of kinship. (g) But in each sub-branch a general secular precedence is conceded to the senior representative according with his pre-eminence in nearness to the ancestor and in ceremonial observances. (h)

With such cases as we are considering may be classed for some purposes the one relating to the confiscated estates of

(a) See St. L. C. 53, 179. Comp. Morgan, Anc. Soc. pp. 6, 528, 535.

(b) See Sir H. Maine, Early Hist. of Inst. p. 191 ss.

(c) See Steele, L. C. loc. cit. 208, 218, 225.

(d) See Steele, L. C. 417.

(e) Steele, L. C. 205, 218, 229.

(f) See Coleb. Dig. loc. cit.; Steele, L. C. pp. 60, 63.

(g) Coleb. Dig. loc. cit. ad fin.; above, p. 264.

(h) See Steele, L. C. 217, 218, 221, 229, 413, 417.

the late King of Delhi, of *Raja Salig Ram and others v. The Secretary of State for India* (a) where it was said: "The territories were assigned to him for the support of his royal dignity, and the due maintenance of himself and family in their position. If he had died, or abdicated, his successor would have taken the property in the same way, free from all charges. It was a tenure (so far as it was a tenure at all), *durante regno*, and on his deposition his estate and interest ceased, and all charges and incumbrances created by him out of that estate fell with the estate itself." In the same case a letter of the Government of India is quoted with seeming approval: "The general rule is that rent-free estates, secured by grants from Government, are not liable for the debts of deceased grantees. The exception is in the case of such estates which have been confiscated, and this exception is based on the consideration that 'the interests of justice' require the protection of creditors from the effects of a political catastrophe which they could not have foreseen." (b)

The rule and the exception above stated imply however that there may be what is called a *Rāj*, or an estate held after the manner of a *Rāj*, when there is no special political status at all. (c) In such cases the inheritance to the zamin-dári or other estate resembles in general the succession to a true principality. The question is then usually one of "family custom and usage;" (d) and the rules of primogeniture and

(a) L. R. Suppl. I. A. 119, 128. The *raj*, in that case, was not of course subject to the Hindû law, but the principles relied on are equally applicable to the estate of a Hindû *râjâ*.

(b) *Ib.* 129, and *infra*, Bk. II. Chap. III. Sec. 4, Q. 3 a. Steele, L. C. 227, 237, 269.

(c) 2 Str. H. L. 329; Coleb. Dig. Bk. II. Chap. IV. T. 15 Comm. See per Judicial Committee in *Chowdhry Chintaman Singh v. Now-lukko Koonwar*, 24 O. W. R. at p. 256, S. C., L. R. 2 I. A. 269.

(d) Introd. to Bk. I. above, p. 156; *Soorendronath Roy v. Musst. Heeramonee Burmoneah*, 12 M. I. A. at p. 91; *Neelkisto Deb Burmono v. Beerchunder Thakoor*, *ib.* 523; *Raja Udaya Aditya Deb v. Jadub Lal Aditya Deb*, L. R. 8 I. A. 248; *Bhau Nanaji v. Sundrabai*, 11 B. H. C. R. 249.

of exclusion of females in favor of male collaterals may prevail under a “Kulâchâr” or family custom, as to an estate that is not a “râj” even in the popular sense. (a) The impartibility of the estate in such a case is not enough to make the succession to it similar to that of a separate estate. (b) Property may be joint though impartible. (c) “Though property be impartible, yet the nearest male member of the joint family inherits in preference to the daughters of the last holder, as admitted in the *Shivagunga* case, (d) though without effect there, as the estate was a separate acquisition.” (e) The family estate may comprise partible as well as impartible property, each following its own line of descent, (f) and in such a case a partition may be made with reference to the latter, so that it becomes, as regards the other parceners, a separate estate in the hands of the senior co-sharer to whom it is allotted. (g) This decision may be referred either to a resignation by the other members of their rights for a consideration in the form of their several shares, or to an abandonment by mutual agree-

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(a) *Baboo Gunesh Dutt v. M. Moheshur Singh et al*, 6 M. I. A. 164; *Bhâu Nandji Utpât v. Sundrâbdi*, 11 Bom. H. C. R. 249, 269; *B. Beer Pertab Sahes v. M. Rajender Pertab Sahes*, 12 M. I. A. 1; *Chowdry Chintaman Singh v. Musst. Nowlukho Konwari*, L. R. 2 I. A. 263; *The Court of Wards v. R. Coomar Deo Nundun Singh et al*, 16 C. W. R. 142 C. R.

(b) *S. R. Y. Venkayamah v. S. R. Y. Boochia Venkondora*, 13 M. I. A. at p. 339.

(c) As said by the Privy Council in *Tekaet Doorga Pershad Singh v. Tekaetnee Doorga Kooere*, L. R. 5 I. A. at p. 152, 159. See *Periasami v. Periasami*, *ib.* p. 61.

(d) *Katama Natchiar v. The Rajah of Shivagunga*, 9 M. I. A. 539.

(e) *Sheo Soondary v. Pirthee Singh*, L. R. 4 I. A. 147.

(f) *Rawut Urjunsing et al v. Rawut Ghunsiam Singh*, 5 M. I. A. 169.

(g) *Tekaet Doorga Pershad Singh v. Takaetnee Doorga Kooere et al*, 20 C. W. R. 155, S. C.; L. R. 5 I. A. at p. 152.

ment of the special custom of descent, (a) and to a partition accompanying it, which thenceforward makes the rights of the sharers *inter se* those of owners of separate property. (b) The intention however must be distinctly expressed in order to free the impartible estate from the established custom (c).

In *Bodhrav Hanmant v. Narsinga Rav*, (d) the Privy Council held that an important inam was subject to the ordinary rules of partition. Where indeed the grant was

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(a) "The custom is capable of attaching and of being destroyed." Privy Council in *Soorendronath Roy v. Musst. Heeramonee*, 12 M. I. A. 91. See also *Gopal Das v. Nurotam Singh*, 7 C. S. D. A. R. 195; *Rajkishan v. Ramjoy*, I. L. R. 1 Calc. 186; above, p. 156-7.

(b) In *Raja Bishnath Singh v. Ramchurn Mujmoadar*, B. S. D. A. R. for 1850, p. 20, it was held that an eldest brother could give his younger brothers equal rights as against himself by an acknowledgment, but that this did not exclude a question as to the validity of an adoption by one of the juniors according to the family law.

(c) See the case of *Chintdmun v. Nowlukho*, cited below, I. L. R. 1 Calc. at pp. 161, 162.

(d) 6 M. I. A. 426. In *Girdharee Singh v. Koolahul Singh*, 2 M. I. A. at p. 35, a claim to a rāj as impartible was held refuted by evidence of "a course of possession and enjoyment" opposed to its impartibility. An impartible rāj is not necessarily inalienable, see above, p. 159, but this cannot of course be meant to imply that generally such an estate is alienable. Its alienable quality would be made use of to effect partition contrary to the law, or still more completely to destroy the interests meant to be guarded by impartibility. See above p. 173, and Bk. I. Chap. II. Sec. 13, Q. 10, p. 462. A vṛitti or income receivable for religious services is partible property, and may be even mortgaged and sold in execution of a decree. It was held that the mortgagor's right having been decreed to be sold the question of its liability to this process could not be raised in execution, *Sadashiv Lakshman Lalit v. Jayantibai*, Bom. H. C. P. J. F. 1883, p. 27, referring to *Bechardas v. Gokha*, Bom. H. C. P. J. 1882, p. 379, and *Prannath Paurey v. Sri Mangula Debia*, 5 C. W. R. 176 C. R. Comp. *Ukoor Doss's case*, *supra*, p. 185, note (b). For the mode of distribution, see Steele, p. 85. That religious grants are generally inalienable, see Steele, L. C. 206, 207, 237, 441, and above, p. 201. A devasthān never reverts to the Government, *ib.* 235.

originally made to support an office, (a) Mr. Ellis said that it is not to be so distributed as to defeat that purpose. "Does not the law," he says, "that regards the grant of a corrody apply to these and similar perquisites? and has not the grantor, or he who pays, a right to see that they are appropriated according to the original intention?..... I have no doubt but it applies, and that similar official perquisites, though certainly heritable, are not divisible, nor ought they to descend by primogeniture. The most capable .....should be selected.....[and] enjoy the whole perquisites." (b) This principle is recognized by the Privy Council in *Ardreshappa bin Gadgiappa v. Guneshidappa* (c) so far as the emoluments may be annexed by any law to the office.(d) A saranjam is usually impartible. It is attended with an obligation to maintain the younger members of the family. A pension substituted for it has the same legal character. (e)

In many cases, temple allowances are hereditary and divisible, (f) though sometimes subject to special rules of descent, (g) or divisible in enjoyment subject to the charge for management which is indivisible. (h) Ancestral property made subject to a trust for an idol was pronounced partible subject to the trust. (i) On the other hand, a vatan property, found to be impartible according to the family custom, was held not to have become partible by the cessation of the official functions with which it had formerly

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(a) See above, Introd. to Bk. I. p. 180, 184.

(b) 2 Str. H. L. 364.

(c) L. R. 7 I. A. 162.

(d) *Ib.* 167.

(e) *Ramchandrar v. Sakharam*, I. L. R. 2 Bom. 346; above, pp. 180, 264.

(f) 2 Str. H. L. 368.

(g) *Bhau Nandji v. Sundrabai*, 11 Bom. H. C. R. 249.

(h) 1 Str. H. L. 210.

(i) *Ram Coomar Pal v. Jogendranath Pal*, I. L. R. 4 Calc. 56.

been connected. (a) What determines the rights in partition as by descent in each case is the family custom, where, according to that custom as clearly proved, a divergence from the ordinary law has become established. (b) Such a family custom allotting certain portions of a Zamindari to the junior members does not render savings and accumulations made by those members joint property. (c)

A family cannot make a custom for itself in opposition to the general law of the country, according to *Baswantrav v. Mantappa*. (d) But where the family is found to have been governed as to its property by a custom which has been submitted to as compulsory, that custom is itself law, (e) though it is extremely difficult to establish such a custom. (f) It is more readily admitted where the custom is found to extend to a considerable class of the community. Thus in *Shidoji Rav v. Naikoji Rav*, (g) the Court says, "we find a general usage amongst a large and important class of the community of dispensing with actual partition and providing for the maintenance of the family by special arrangements varying in different families, the general character of which,

(a) *Savitriava et al v. Anandrav*, R. A. No. 24 of 1874, Bom. H. C. P. J. F. for 1875, p. 132. See *Timangavda v. Rangangavda*, Bom. H. C. P. J. 1878, p. 240.

(b) A document containing a statement of a family custom was construed extensively so as to include the whole class indicated by specification of particular instances of the nearest male collaterals as heirs to a Zamindar who should die childless, *Chowdry Chintamun Singh v. Musst. Nowlukho Konwari*, L. R. 2 I. A. 263.

(c) *C. Hurreehur Pershad Doss v. Gocoolanund Doss*, 17 C. W. R. 129.

(d) 1 Bom. H. C. R. Appx. xlii.

(e) *Sorendronath Roy v. Musst. Heeramonee*, 12 M. I. A. 91. Comp. *Abraham v. Abraham*, 9 M. I. A. 195, and *Timangavda v. Rangangavda*, Bom. H. C. P. J. 1878, p. 240; *Mathura Naikin v. Eru Naikin*, I. L. R. 4 Bom. at pp. 562, 573.

(f) *Icharem v. Ganpatram*, S. A. No. 294 of 1871, Bom. H. C. P. J. F. for 1873, p. 169.

(g) 10 Bom. H. C. R. 228.

however, is the vesting of the family property principally in the representative of the elder branch, subject to the support of the other members," (a) and as to such a custom, that it "is one which, if clearly proved, should be allowed to displace the plaintiff's right to partition under the general law." The District Judge finding the custom proved for the particular family was to determine what provision by way of maintenance was to be made for the plaintiff, who had sued for a partition. (b)

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(a) See Bk. I. Introd. above, pp. 263, 264.

(b) Comp. Laboulaye, *op. cit.* 368. In cases of the kind here considered the law of descent is determined by the personal status of those concerned. The special rule does not adhere to the land itself independently of the hands in which it is held. Under the English law a special quality as to descent is deemed inherent in some lands, or, rather the proprietary relation to them. Thus a manor given first in frankalmoigne and afterwards by knight service was held to be still gavelkind. See *Elt. Tenure of Kent*, 263, 377. But this notion, though sometimes referred to in the Courts, is strange to the Hindû Law. (See *Periasâmi v. Periasâmi*, L. R. 5 I. A. at p. 75, and the instances at *Nort. L. C.* 278, and comp. *Coleb. Dig. Bk. II. Chap. IV. Sec. 1, T. 15, Comm.*) A Zamindari or Vâtan once effectively aliened or even divided is freed from any special rule of descent. It is not *impartibilis ratione terrae*, as gavelkind established by custom before the Conquest made land in Kent, *partibilis ratione terrae*. See *Bract*, 374 a. In such instances as the *Hunsapore* case (12 M. I. A. 1) and the *Shivagunga* case, the fact that an estate was assigned to a branch of a family not entitled in the regular course of law was said not to change its previous impartible character (*Mutta Vuduganadha Tevar v. Dorasingha Tevar*, L. R. 8 I. A. at p. 116), but in both cases the new grantees from Government were of the proprietary family and subject to its custom as to any estate to which that custom extended. Such cases as these are to be distinguished from those like *Raja Nilmoney Singh v. Bukram Singh* (L. R. 9 I. A. 104), in which lands are held as a remuneration for service for the maintenance of which they have been conferred, or a grant has been taken at a reduced land-tax in consideration of service to be rendered. These may be impartible on account of their attendant condition of service, either wholly, or without the approval of the Government. They may be inalienable either absolutely, or in a qualified way allowing an aliena-

As regards hereditary offices and their emoluments in the Bombay Presidency, (a) these are now regulated by positive enactments of the Legislature. See Bombay Act III. of 1874, by which a prohibition is imposed on Vatan property's leaving the family of the office-holders, and provisions are made for placing it under the control of the Collector. Subject to this, however, the right of the eldest member of a Patil family to officiate, as it is the usage of a large number of families, is regarded as "usage of the country," which by Sec. 26 of Reg. 4 of 1827 our Courts are bound to recognize and enforce. (b) In the case of Bhagdâri and Narvadâri holdings in Gujarâth the Legislature has provided against subdivision or separation of the house from the holding, (c) but without any rule as to inheritance or partition. These are left to the Hindû law and custom. (d)

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tion of part or for a life, or subject to particular fiscal conditions, or as to the persons of the alienees. These conditions and qualifications may be found in the case of vatans in Bombay. A jaghir or saranjam is usually impartible, and the succession is according to primogeniture; *Rámchandra Mantri v. Venkatrav Mantri*, I. L. R. 6 Bom. 598; above, pp. 173, 179.

(a) See above, Bk. I. Introd. p. 173.

(b) *Sanganbusapa v. Sangapa*, Bom. H. C. P. J. 1879, p. 257. Comp. *infra*, Bk. II. Chap. III. Sec. 4, Q. 3; and Bk. II. Chap. II. Sec. 1, Q. 5.

(c) See Bom. Act V. of 1862.

(d) See *Bhai Shanker v. The Collector of Kaira*, I. L. R. 5 Bom. 77; *Pránjivan Dagárám v. Bái Revá*, *ib.* 482.

The customary law of the castes preserves many restrictions on the disposal of the patrimonial lands. See Steele, L. C. pp. 429, 432. Even after a partition in many castes the interest of the relatives is thought to prevent an alienation or incumbrance without their assent signified by attestation, *ib.* In many the succession of a daughter is not admitted in competition with separated brothers and uncles, *ib.* 424 ss.; as some of the Madras customs exclude even the widow, 2 Str. H. L. 163.



## IV.—LIABILITIES ON INHERITANCE.

§ 6. The liabilities or charges on the common property, distributable on division, include the following:—

- A. Debts, (a) for which the coparceners at large are liable, must, in general, have been incurred before partition, by a father or other managing member of the family, for the common benefit. (b)

(a) Compound interest may be stipulated for and recovered under the Hindû law, *Ramchandra and others v. Lalsha*, Bom. H. C. P. J. 1833, p. 45; Coleb. Dig. Bk. I. T. 49 Comm.; Steele, L. C. 72. The rules of the Hindû law on this subject are much more reasonable than those of the Roman law, which in some measure still prevail in the English law. The maximum of interest recoverable on an ordinary loan is a sum equal to the principal; on loans of grain and other articles different limits are prescribed. See Steele, L. C. pp. 266 ss. When interest has accumulated to the amount of the principal, it is to be turned into principal by a new account, or by a fresh transaction, but to this there is no objection; Steele, L. C. 265; Vyav. May. Chap. V. Sec. I.; Coleb. Dig. Bk. I. T. 59, 255 ss. As to the assignment of obligations, *ib.* T. 49, and Bk. II. Chap. IV. T. 27. As to dealing with mortgaged property, Bk. I. T. 117; Bk. II. Chap. IV. T. 28; Vivâda Chint. Trans. pp. 73, 76, 316. See now the Indian Contr. Act, IX. of 1872.

(b) May. Chap. IV. Sec. 6, paras. 1, 2; Stokes H. L. B. 72; Chap. V. Sec. 4, para. 20; *ibid.* 124. The debt of a father is a charge generally, as far as his sons are concerned, though not incurred for the common benefit. Nârada, Pt. I. Chap. III. paras. 5, 6. See *Suraj Bunsee Koer v. Sheo Prasad Sing*, L. R. 6 I. A. 88; and *Laljee Sahoy v. Fakeerchand*, I. L. R. 6 Calc. 135; *Narayanrav v. Balkrishna*, Bom. H. C. P. J. 1831, p. 293; *Muttayan Chetti v. Sivagiri Zamindar*, I. L. R. 3 Mad. at p. 381; Steele, L. C. 266; and above, pp. 164 ss. 637 ss. But the estate is not so hypothecated, without a special lien, for the father's debt, as to prevent the son or other heir disposing of it and giving a good title for valuable consideration, *Jamiyatrâm v. Parbhudâs*, 9 Bom. H. C. R. p. 116; *Sheshigiri Shanbhog v. Gungoli Abboo Saiba*, S. A. No. 88 of 1873, Bom. H. C. P. J. F. for 1873, p. 31. In *Bheknarain Singh et al v. Januk Singh*, I. L. R. 2 Calc. 438, 443, White, J., says:—"The liability of a son for the debts of his deceased father under Hindû Law appears to me to be a distinct question from the right of a father in his life-time to charge the interest of the infant sons in the joint ancestral immoveable estate

B. Provision must be made for relations of the coparce-  
entitled to a portion or maintenance.

A. *Debts.* (a)—The Hindû Law lays down broadly that sons and grandsons shall discharge the obligations of their ancestors, (b) except where they have been contracted for immoral

with the payment of a debt.....There seems to be no essential difference between the position of the father when dealing with those interests during the minority of his sons, and the position of a mother when dealing as guardian and manager of her infant son's estate." See *Narayan Acharya v. Narso Krishna et al*, I. L. R. 1 Bom. 262, and the cases there referred to; the texts referred to above, p. 644, and pp. 80, 161. The funeral expenses of a deceased Hindû are a charge on the family property, *Sadashiv Bhasker v. Dhakubai*, I. L. R. 5 Bom. 451. A widow's subsistence is sometimes deemed by the Śāstris a charge preferable to any other debt, as in the case at 2 Str. H. L. 280, but this opinion is not followed; see above, pp. 99, 102, 259. The widow's dower is preferred to the claim of the usurer by the 11th Art. of Magna Charta, see Stubbs, Docts. &c. p. 290.

(a) A father's promises are looked on as binding unless the performance of them would prevent the fulfilment of some still more sacred duty. His dying directions as to charities within reasonable limits must be obeyed. These rank as testamentary dispositions. See Steele, L. C. pp. 404, 429. But the Courts will not enforce either of these obligations except subject to the conditions of the Statute law where that is in force. See above, pp. 206, 207, 224; Steele, L. C. 178, 233, 238.

(b) Vishnu, Tr. p. 45; May. Chap. V. Sec. 4, para. 12; Stokes, H. L. B. 122; *Umrootram Byrages v. Narayandas Ruseekdas*, 2 Borr. 222; *Ram Narain Lal v. Bhawani Prasad*, I. L. R. 3 All. 444, 445; *Laljee Sahoy v. Fakeerchand*, I. L. R. 6 Calo. 135; (*Mitdkshard Law*), 1 Str. H. L. 167; 2 *ibid.* 274, 277, 477; Coleb. on Obligations, Chap. II. 51; *Smriti Chandrikā*, Chap. II. Sec. 2, paras. 20, 24; Coleb. Dig. Bk. I. T. 167; Steele, L. C. 265, 266, 409.

It is assumed here that the father's "kriyā" or funeral ceremonies have been performed or provided for. For these all the sons are liable, though their rights are not conditional, Steele, L. C. pp. 226, 414 ss; and they should act together, see above, pp. 603, 604; Steele, L. C. 404, 413. The obligation of providing for the father's debts is limited by the qualification "at least for those incurred in necessary

purposes, (a) and this duty is not altered by a partition amongst the sons. In the case of *Unnoda Soonduree Dassas v. Oodhubnath Roy*, (b) three brothers had separated while a decree against their father remained unsatisfied. In execution the shares of two of the brothers were sold. It was held that the excess, beyond two-thirds of the amount of the decree, could be recovered by the two brothers from the share of the third, even though this had passed to a stranger, by a sale made before the execution was levied. (c) It may be doubted perhaps whether this decision and that referred to in note (d) at p. 628 are reconcilable in principle. (d) In the Bombay Presidency, the liability has been limited by Bombay Act VII. of 1866, under which an heir is respon-

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expenses of the family," Steele, L. C. p. 57, 217; but this has been enlarged by the Courts. See above, pp. 80, 160, 207, 208, 625, 631, 639.

If valid incumbrances have been created by the father as the manager, these will of course form a deduction from the estate to be distributed. See above pp. 609, 635, 637 ss. In the case of mortgages, which are usually accompanied by possession, the mortgaged portion is frequently preserved for future partition. Otherwise it is allotted at a valuation of the equity of redemption to the share of one of the parceners. See above, Sec. 4 B; comp. Steele, L. C. p. 218. The right of the managing member to mortgage and even to sell the estate of the family to relieve its difficulties is widely admitted by the customary law. See Steele, L. C. p. 398. Hence the presumption in favour of his transactions. In. Ev. Act, I. of 1872, Secs. 114, 115.

(a) May. I. c. para. 15; Stokes, H. L. B. 122. "The pious obligation of a son to pay his father's debts is confined to debts contracted for moral purposes." *Jettyapa v. Lawimaya*, Bom. H. C. P. J. 1883, p. 87. See above, pp. 634, 635, 641, 643.

(b) 11 C. W. R. 125 C. R.

(c) See Coleb. Dig. Bk. I. T. 182.

(d) The law as to a single coparcener's alienation, and a creditor's sale in execution, are discussed above, pp. 631 ss. See *Deendyal Lall v. Jugdeep Narain Singh*, L. R. 4 I. A. 247; *Suraj Bunsu Koer v. Sheo Prasad Singh*, L. R. 6 I. A. 88, 101; *Lakshman Dada Naik v. Ramchandra Dada Naik*, L. R. 7 I. A. 181, 195; *Babaji Sakhoji v. Ramshet et al.*, 2 Bom. H. C. B. 23. The decisions have been influenced by

sible only to the extent of the assets received by him ; (a) and his property cannot perhaps be aliened or encumbered by the father, except for good reasons into which the encumbrancer is bound to inquire. (b) The tendency of the decisions however has been to extend the father's power of disposal and incumbrance as against his sons. (c)

In the case of a united family consisting only of brothers or collaterals, it has been laid down, that the presumption usually arises of a debt incurred by a managing member being for the benefit of the family, (d) but that in the case of a minor coparcener's interests being affected, the creditor, seeking to enforce the liability, must prove that it was *bonâ fide* incurred by the manager, or at least that there were good grounds for supposing it to have so been incurred. (e) Under the Bombay Act, above quoted, Sec. 5, the liability of a coparcener, as to debts contracted before he was 21 years of age, is limited to the amount of the portion of the common property received by him. Even when the other coparceners are adults, charges incurred by the manager are binding,

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suspected collusion, which, however, is not to be taken as having been a ground of decision in *Girdharilal's* case, as said by the Judicial Committee in *Muttayan Chettiar's* case, L. R. 9 I. A. 128 ; *Balmokund et al v. Jhoona Lall*, N. W. P. S. D. A. R. for 1857, page 14 ; *Musst. Kooldeep Kooer et al v. Runjeet Singh et al*, 24 C. W. R. 231 ; *Shoo Pershad Singh et al v. Musst. Soorjbunsee Kooer*, *ibid.* 281 ; *Burtoo Singh v. Ram Purmessur Singh et al*, *ibid.* 364.

(a) See above, pp. 80, 165.

(b) See *Narain Singh v. Pertum Singh et al*, 11 Beng. L. R. 397, S. C., 20 C. W. R. 192 ; *Modhoo Dyal Singh v. Goolbar Singh et al*, 9 *ibid.* 511 C. B. ; *Brojo Kishore Gujendar v. Huree Kishen Doss et al*, 10 *ibid.* 58 C. B., as compared with *Kanto Lall et al v. Girdhari Lall et al*, 9 C. W. R. 471 C. R., reversed in P. C., L. R. 1 I. A. 321 ; *Hari v. Lakshman*, I. L. R. 5 Bom. 614, 618. Above, pp. 614 ss.

(c) See above, pp. 81, 167 ss, 207, 645.

(d) See *Babaji v. Krishnaji*, I. L. R. 2 Bom. 666 ; *Vrijbhukandas v. Kirparam*, Bom. H. C. P. J. 1879, p. 263.

(e) See above, pp. 609, 620, 634, 637. But in *Chamaili Kuar v. Ram Prasad*, I. L. R. 2 All. 267, good faith was held not to protect a purchaser of property sold for immoral purposes even by a father.

except as against him, only when incurred for the needs of the united family, or with the assent, express or implied, of its members. (a)

For a debt incurred by any member of the family under the pressure of distress, all members are liable, (b) and the property even after partition, but not for a debt incurred needlessly or for purposes not constituting a duty, which, as a member of the family, the debtor was bound to discharge

(a) 1 Str. H. L. 199; 2 *ibid.* 344, 434, 457; Coleb. Dig. Bk. I. Chap. V. T. 180 ss; Bk. II. Chap. IV. T. 54, Comm. *sub fin.*; above, p. 634; *O. Colum Comara Vencatackella v. R. Rungasawmy*, 8 M. I. A. at p. 323. A member defrauded by the contract of a manager with a third party cognizant of the fraud may have the contract rescinded, *Ravji Janardan v. Gangadharbhat*, I. L. R. 4 Bom. 29, though generally bound by his dealings and under circumstances by decrees against him, *Bhimasha v. Ramchandrasha*, Bom. H. C. P. J. F. for 1878, p. 286; *Annaya v. Hoskeri Ramappa*, Bom. H. C. P. J. F. for 1875, p. 75; *Upooroop Tewary v. Lalla Bandhjee*, I. L. R. 6 Calc. at p. 753 (see above, pp. 634 ss.; Steele, L. C. 209). At Calcutta it seems to have been intimated that the question of the propriety of the alienation arises only when infants' shares have been disposed of, and as to their shares, since as regards those of adult members their assent is indispensable, *Kameshwar Pershad v. Run Bahadur Singh*, I. L. R. 6 Calc. 843; and in all cases due inquiry must be made by a purchaser or incumbrancer of the family property. For Bombay the general liability for a manager's acts is asserted in *Samalbhai Nathabhai v. Someshwar Mangal Harkisan*, I. L. R. 5 Bom. 39. The rights of a decree-holder for the father's debts were preferred to those of a decree-holder for the debts of the owner himself, in *Gunga Narain v. Umesh Chunder Bose et al*, C. W. R. for 1864, p. 277.

(b) May. Chap. V. Sec. 4, para. 20; Stokes, H. L. B. 154; Colebrooke, Dig. Bk. V. Chap. VI. T. 373, Comm. *ad fin.* See also under the three preceding texts; Bk. I. Chap. V. T. 181, 193, 194; and 1 Str. H. L. 276. See also *Mahada v. Narain Mahadeo*, 3 Morris 346; *Sadabart Prasad Sahu v. Foolbask Koer et al*, 3 B. L. R. 31 F. B. R.; *Mahabeer Persad v. Ramyad Singh et al*, 12 B. L. R. 90; and above, p. 632. On the same principle a mortgage or sale of the common estate by an ordinary member, if made to meet some pressing family exigency, is generally recognized as valid by the customary law, see Steele, L. C. pp. 54, 210, 399.

under the circumstances. (a) If a member of the family owes to the estate a debt barred by limitation this may still be made a deduction from his share in the gross accumulations. (b)

§ 6 B. *Provisions for relations, &c.*—Subject to provision for the debts for which the joint estate is liable, (c) certain relations, though not themselves entitled to definite aliquot shares of the common property, even when a partition is made, are yet entitled, while the family is united, to maintenance or provision by way of marriage portion, and this right continues to subsist, notwithstanding an agreement for partition amongst the co-sharers. (d) To this class belong—

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(a) See above, pp. 161, 164, 167.

(b) *Lokenath Mullick v. Odoychurn Mullick*, I. L. R. 7 Calc. 644.

(c) *Lakshman Rāmchandra v. Satyabhāmbāi*, I. L. R. 2 Bom. 494; *Damodar v. Bai Meva*, Bom. H. C. P. J. 1882, p. 398.

(d) As to the person disqualified "if there happen to be no property, his relatives must still afford him maintenance," Borr. Collection, Bk. F. *sub init.* Broach Brāhmans. So amongst Sonis, *ib.* Sheet 22; Salvee, Sheet 43. "Sons and others, who by reason of infirmity, &c., are disqualified from taking the share in an inheritance, which would otherwise come to them, are directed to be maintained by those to whom their shares thus go over, and a direction of this kind, given by the lawgiver, when prescribing the mode and condition of inheriting, is, I think, rightly construed as amounting to the creation of a charge upon the inheritance," Phear, J., giving the judgment of himself, Jackson, and Hobhouse, JJ., in *Khetramani Dossee v. Kasheenath Dos*, at 10 C. W. R. 97 F. B. S. C., 2 B. L. R., A. C. J., at p. 52. Their right however is simply one of maintenance. See the *Smṛiti Chandrikā*, Chap. V. para. 20. The same term "*bhartvyam*" is used by Yājñavalkya to signify their claim and the claim of their wives, and the same verb "*bharāṇe*" is used to express the right to support of a deceased coparcener's widow in Nārada, Pt. II. Chap. XIII. para. 28. See as to a widow's and mother's right, 2 Str. H. L. 292, 294; above, pp. 163, 232, 248, 259. If the father is superseded as manager on account of misconduct or incompetence his maintenance must be provided for by the managing member. This remains a charge on the property, for which, like the mother's subsistence and the funeral expenses of both

1. All persons by connexion entitled but by some defect disqualified from inheriting, their wives, daughters, and disqualified sons. (a)

2. Female relations not entitled to a specific share.

§ 6 B. 1. Regarding the former, *see* Book I., Intro. p. 153, 248, and above, p. 751, note (d). The *Smṛiti Chandrikā*, Chap. V., paras. 24, 25, says that the obligation of support is

the sons, are bound to make a reserve in any subsequent partition before the necessity has passed away; Steele, L. C. pp. 203, 404, 405, 413.

Should the sons or other near relatives fail to perform the funeral ceremonies of the deceased, they may be put out of caste. But the non-performance does not destroy the right of inheritance, nor does performance by a more distant relative give him a preference over a nearer one; Steele, L. C. pp. 413 ss.

(a) *See* Bk. I. Chap. VI. Sec. 3 b, Q. 3; above, p. 537. For the cases of exclusion from sharing the patrimony under the customary law of particular castes, *see* Steele, L. C. pp. 224, 411. The many exceptions admitted to the harsh rules of exclusion mark a gradual abandonment of those rules of the archaic law which can least be reconciled with the dictates of natural sympathy. Comp. Steele, L. C. 234, 235. That the continuation of the family rites and the inheritance were in ancient law regarded as essentially connected, *see* Manu, IX. 142, and the Commentary; Vyav. May. Chap. IV. Sec. 5, paras. 21, 22; Stokes, H. L. B. 65; Sec. 11, para. 8; Stokes, H. L. B. 109; Bṛihaspati declares the vicious son liable to exclusion, since the patrimony "is declared to belong to those kinsmen who offer funeral oblations to the deceased and are virtuous." It is however an inversion of the proper order of ideas to conceive the right to sacrifice to a deceased as a source of the right to succeed to his estate. *See* above, p. 751, note (d); Steele, L. C. 226. The right to succeed resting on consanguinity, *see* above, pp. 62, 66, takes with it the duty of sacrifice with a more or less definite condition of defeasance in the event of failure or incapacity to perform the duty, but the duty subsists though there be no property at all (Vishṇu XV. 43), and the right arises to the heir immediately on the death of the owner, not mediately, through the celebration of the Śrāddhs or the right to celebrate them, except perhaps where a defeasance has occurred or the heirship has been renounced by the person entitled.

avoided by not taking the disqualified person's share, (a) but as to this *see* above, pp. 284, 249. It will have been seen that the wives and widows of members equally with the members themselves who could take no share in the common estate are held entitled to maintenance by the co-members in virtue of the membership of such women in their family of marriage. (b) This illustrates the statement in the *Introd.* to Bk. I. above, p. 251.

§ 6 B. 2. Female relations, not entitled to a specific share but to maintenance, are widows of predeceased sons and other descendants (unseparated) of the common ancestor, (c) and daughters of such persons, in case of their having left no sons. (d) Such daughters are also entitled

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(a) Brethren who have retired from the world take no share. Eunuchs and madmen excluded must be provided with maintenance; *Vasishṭha*, Chap. XVII. paras 27, 28. So also idiots, cripples, and those afflicted with apparently incurable and disabling disease; *Nārada*, Pt. II. Chap. XIII. para. 22.

(b) *Mit.* Chap. II. Sec. 10, para. 14. Failing the husband's family, a widow's brothers support her; *Steele*, L. C. 215.

(c) The disposal of a widow is one of the duties cast on the nearest relative of her deceased husband. (*Vasishṭha*, XVII. 56.) *Nārada* says he may appoint her to a kinsman (*vinīyog*). In the *Vyav. May.* Chap. IV. Sec. IV. paras. 41, 44, and the *Vīramitrodaya* (Transl. p. 105 ss.) the begetting of a son by this agency (a *Kshetrāja*) is provided for as though it still formed part of the jural system. This can hardly have been the case, but the *Mitāksharā* gives him the second place amongst the subsidiary sons, the appointed daughter's son (*putrikā-putra*) being assigned the first.

The interest of the brethren in their brother's wife under the ancient law has been referred to above, p. 417 ss.

(d) The daughter of a deceased coparcener must be maintained. *See* above, p. 501; *May.* Chap. IV. Sec. 8, para. 6; *Stokes*, H. L. B. 85; *ibid.* Sec. 9, para. 22; *Stokes*, H. L. B. 97; *Mit.* Chap. II. Sec. 1, paras. 7 and 20; *Stokes*, H. L. B. 429, 433; *Jykwur et al v. Musst. Bhootee*, N. W. P. Sel. Ca. for 1863, p. 613. *See Nārada*, Pt. II. Chap. XIII. and as cited by the *Vīramitrodaya*, Transl. p. 255; Bk. I. Chap. II. Sec. 3, Q. 14, p. 384. *See* above, Bk. I. Chap. II. Sec. 1, Q. 17, p. 363; Bk. I. Chap. II. Sec. 6 A, Q. 27, p. 408; Bk. I. Chap. II. Sec.



to a marriage portion. (a) This last rule regarding daughters, though not given explicitly for undivided coparceners by the Hindû lawyers, may be deduced from the injunction given to reunited coparceners at May. Chap. IV. Sec. 9, para. 22, (b) Mit. Chap. II. Sec. I., pl. 20, (c) and from that given to the relations of persons disabled from inheriting, to maintain and to marry the daughters of such persons, Mit. Chap. II. Sec. 10, para. 12. (d) Even concu-

7, Q. 10, p. 436. In some castes provision has to be made by a reserve for an indigent widowed sister residing with the family; Steele, L. C. p. 405. Comp. above pp. 232, 241, 246.

(a) Steele, L. C. 233, 234.

(b) Stokes, H. L. B. p. 97.

(c) Stokes, H. L. B. p. 433.

(d) Stokes, H. L. B. p. 457. The marriage expenses of boys and girls of the family are to be provided for by a reserve for the purpose in a partition, Steele, L. C. p. 404, 422; see Nārada, Pt. II. Chap. XIII. para. 33. A present made by a deceased father is excluded from partition, see above p. 211, and comp. Steele, L. C. p. 424; Nārada, Pt. II. Chap. XIII. para. 6.

In the case of *Laroo v. Manickchund Shajee*, at 1 Borr. 461, there being a son initiated and one uninitiated, by different mothers, and a daughter, it was held that the initiation of the son should take place at the cost of the estate, that the daughter should have a portion of  $\frac{1}{4}$  of  $\frac{1}{4} = \frac{1}{16}$  of the property, and that the remainder should be evenly divided between the half-brothers, each of whom was to maintain his own mother, Mit. Chap. I. Sec. 7, pl. 3, 4, 5, 7; Stokes, H. L. B. 398-9.

The property for partition was in one case pronounced subject to the following charges:—

- (a) Debts due by the family.
- (b) Bad debts due to the family included in the aggregate assets.
- (c) Marriage expenses of unmarried brothers and sisters.
- (d) Maintenance of female members:—
  - (1) Aunt of parties.
  - (2) Mother of plaintiff.
  - (3) Sisters, if unmarried.

A deduction on account of a Mandir, as after separation the plaintiff would not be interested in it, was disallowed, *Damodarbhat v. Uttamram*, Bom. H. C. P. J. F. for 1878, p. 231.

bines are entitled to maintenance out of an hereditary pension. (a) A widowed sister, left destitute by her husband, must be provided for by the widows of the deceased in a distribution of his property. (b)

The rule that all widows of predeceased coparceners, though not entitled to a share on partition, have a claim to maintenance as against the estate, (c) which is supported by the analogy of the rules regarding wives of persons disqualified from inheriting, (d) has been laid down by Sir R.

(a) 2 Str. H. L. 32; above, p. 154.

(b) *Ibid.* 83, 90.

(c) If there be joint estate sufficient the widow of a deceased coparcener is undoubtedly entitled to maintenance, *Savitribai v. Laxmibai*, I. L. R. 2 Bom. 573.

The widow of a predeceased son (undivided) is entitled to maintenance from his father and brothers out of the joint ancestral estate, *Musst. Lalti Kuar v. Ganga Bishan et al*, 7 N. W. P. 261 F. B. The possession of jewels, &c., suited to her station and not productive of income, does not affect a widow's claim to maintenance against her father-in-law. Her productive property should be taken into account, *Shib Dayee v. Doorga Pershad*, 4 N. W. P. 73.

The Smṛiti Chandrikā, Chap. XI. Sec. 1, pl. 34, 35, fully recognizes the right to maintenance, or by way of compensation to an allotment for life of a share of the undivided property. It assigns a higher right to the Patni, paras. 37, 38.

"The maintenance of *Net Konwar*, the widow of *Muddun Mohun*, was a charge upon the inheritance, which came from *Muddun Mohun*" (in the hands of his son's widow), per Sir B. Peacock, in *Baijun Doobey v. Brij Bhokun Lall Awasti*, at L. R. 2 I. A. 279.

As to the recognition of the duty by sharers in the mirāsi villages of the N. W. P., see Fortescue's Report on Delhi, dated 28th April 1820, III. R. & J. Sel. at p. 404.

(d) Mit. Chap. II. Sec. 10, paras. 14, 15; Stokes, H. L. B. 457-8. In *Ujjal Mani Dasi v. Jaygopal*, 4 C. S. D. R. 491, the Pundit said that a predeceased son's widow was entitled to maintenance proportionate to the father's estate. In *Rai Sham Ballabh v. Prankishan*, 3 C. S. D. R. 33, the widow of a predeceased son was held after the father's decease entitled to no charge but to food and raiment only; to be received in her father-in-law's house, *Ramsoondri Debra v. Randhun Bhuttacharjee*, 4 C. S. D. A. R. 796. See further *Khetramani Dasi v. Kashinath Das*, 2 B. L. R. 55 A. C. J. Sir

Couch, C. J., in *Ramachandra Dikshit v. Savitribai*. (a) The question of a widow's right to maintenance is discussed at length in the Introduction to Book I. Sec. 10, (b) and the rights as they subsist against the family are those which the heirs must satisfy when they propose to divide the common estate. In Madras a daughter-in-law was held entitled to maintenance (c) as a charge on ancestral property held by her deceased husband's father, and free from the condition

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L. Peel says, in *Judeamani Dasi v. Kheytra Mohun Shil*, Vyav. Darp. 384: "Strange.....treats the right to maintenance as a charge on the property in the hands of the heir, and it certainly has always been so considered in this Court." He considers the duty to reside with the husband's family merely a moral one; but adds "we shall award Rs. 10 a month, and the back maintenance must date only from the date of the demand. We might in a proper case say there shall be no back maintenance, and further maintenance should be enjoined only on the condition of residence with the late husband's family....." See *Srinivasammal v. Vijayammal*, 2 Mad. H. C. R. 37; *Ramachandra Dikshit v. Savitribai*, 4 Bom. H. C. R. 73 A. C. J. In *Musst. Bhilu v. Phul Chand*, 3 B. S. D. A. R. 223, a surviving brother was compelled to afford maintenance to his deceased brother's widow, and in a similar case a widow was told that she ought to have sought maintenance and not a share. *Musst. Himulla Chowdraya v. Musst. Pudoo Mune Chowdraya*, 4 B. S. D. A. R. 19.

(a) 4 Bom. H. C. R. 73 A. C. J. The learned Judge, however, on a subsequent occasion, refused to recognize the authority of this case. See *S. M. Nistarini Dasi v. Makhanlal Dut et al*, 9 B. L. R. 27. He says, "The question there was, as to whether one brother could be sued alone, and it was held that he could." Still the brother appears to have been sued as holding part of the family property, not as liable apart from that circumstance. In *Lakhsman Ramachandra et al v. Satyabhamabai*, I. L. R. 2 Bom. 494, it has been held that the claim is against the estate in the hands of surviving coparceners, and that its non-liability in the hands of an alienee depends on the apparent necessity or propriety of the sale and the absence of fraud on the widow. See also *Adhiranee Narain Coomary v. Shona Malee Pat Mahadai*, I. L. R. 1 Calc. 365; *Sonda Miney Dossee v. Jogesh Chunder Dutt*, *ibid.* 2 Calc. 262; above, pp. 246, 248, 259.

(b) Above, p. 245 ss.

(c) *Visalatchi Ammal v. Annasamy Sastry*, 5 M. H. C. R. 150.

of residing with him. A Hindû widow's maintenance was pronounced a charge on the estate in any hands, in *Musamut Khukroo v. Joormuk Lall*. (a) In *Rango Venayek v. Yamunabai* (b) it was held that a widow of a coparcener in Bombay, though entitled to maintenance, cannot generally claim a separate maintenance. So also the *Sâstris*, above, pp. 348, Q. 12, and 354, Q. 25, and in *Kashee Chander's* case referred to in 3 Morl. Dig. 178, (c) but in *Kasturbai v. Shivajiram* (d) it is said "where there is family property available for maintenance it lies upon the parties resisting the claim to separate maintenance to show that the circumstances are such as to disentitle the widow thereto." (e)

(a) 15 C. W. R. 263. A person entitled by a decree to maintenance out of an estate may apparently enforce it as a charge on the property into whatever hands it goes. See *S. Baghabati Dasi v. Kanailal Mitter et al*, 8 B. L. R. 225; *Koomaree Debia v. Roy Luckmeeput Singh*, 23 C. W. R. 33. See *Heera Lall v. Musst. Kousillah*, 2 Agra H. C. R. 42. In a partition enforced by a creditor in order to make the father's share available for payment of his claim, the share of the wife should be provided for, *Babu Deendayal Lal v. Babu Jugdeep Narain Singh*, L. R. 4 I. A. 247. Arrears may be awarded as well as future payments, *Râjâ Pirthee Singh v. Râni Râjkoor*, 12 B. L. R. 238.

(b) I. L. R. 3 Bom. 44. See above, p. 79.

(c) In *Shiva Sundari Dasi's* case (Vyav. Darp. 381), Sir L. Peel held that the widow of a predeceased son was entitled to maintenance as against the father-in-law and brothers-in-law though she had quitted the family house at her own mere pleasure. This is quoted with approval in *Raja Pathan Singh's* case, L. R. S. I. A. at p. 247. So *Koodee Monee Dabea v. Tarachund Chuckerbutty*, 2 C. W. R. 134. But where father and son had been separated it was held that the son's widow was not entitled to maintenance, *Rujjomoney Dossee v. Shibchunder Mullick*, 2 Hyde 103; *Parvati v. Kisansing*, I. L. R. 6 Bom. 567. See above, p. 235 ss.

A widowed daughter or sister after being supported by a man in his life must, in parts of the Panjâb, be supported by his heirs after his death, Panj. Cust. Law, Vol. II. p. 180.

(d) I. L. R. 3 Bom. 372.

(e) See above, p. 261.

This doctrine must now be regarded as that of the Judicial Committee, which has declared that a Hindû widow is not bound to residence in her husband's family. (a) The cases therefore decide that a coparcener's widow *is* entitled to maintenance, (b) and *is not* bound to residence. In a case of actual partition it is generally necessary to provide for the widows by separate allotments or charges, both in order to secure their maintenance and as a necessary element of an exact distribution of the estate and its burdens amongst the coparceners. (c) In Bengal the liability of the ancestral

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(a) *See* above, p. 260 ss.

(b) *See* above, p. 363, Q. 17; p. 408, Q. 27; p. 436, Q. 10.

(c) In the case of *Kalu v. Koshibai*, Bom. H. C. P. J. 1882, p. 420, decided since the earlier part of this work was printed, a claim was made by a son's widow against her father-in-law to maintenance for herself and her children. It was held that neither the widow nor the children were entitled to subsistence, the father-in-law's property being self-acquired. As to the former the Court relied on the case of *Savitribai v. Laxmibai*, I. L. R. 2 Bom. 574. If the reasons given in Sec. 10 of the Introd. to Bk. I. are valid the claim of a son's widow in a united family is not, according to the Hindû law, dependent on the existence of joint family property: it is founded on the family relation, and the value of the property is significant only as a means of determining the proper amount or style of maintenance. The judgment of Nanabhai Haridas, J., in *Udaram v. Sonkabai* expresses the view of the Hindû authorities more correctly than the recent one in which he concurred with Sir C. Sargent, C. J.

The Mit. in the chapter to be presently referred to insists most strongly on a man's duty to support all members of his family, and forbids his parting with even his self-acquired property so as to impair his ability to discharge the duty. How far the duty extends is not defined, as far probably as the united family, which seldom comprises relatives more remote than first cousins, and can be broken up at will. It may safely be said to reach as far as a son's family, seeing that the precepts expressly include grandchildren, and the connexion is so strong that the son and the grandson are the first heirs, and must by Hindû law pay their ancestors' debts irrespective of family estate. *See* above, pp. 263, 264.

The Hindû girl has no voice in choosing her husband. She has no claim on her family of birth so long as her family of marriage can sustain her. *See* Nârada, Pt. II. Chap. XIII. paras. 27—29; above, p.

estate to support a widowed daughter-in-law has been

79,163. Her already pitiable lot as a widow must become in many cases desperate if she is reduced to homelessness and starvation in the face of the strongest precepts, hortatory or imperative, of her national law. See above, pp. 231, 246. In denying the claim of the grandchildren the Court refers to *Savitribai's* case as expressing the opinion of three judges that the direction to support a child is imperative. But the legal obligation does not extend, it is said, beyond the son. For this a passage is cited from *Strange's Manual*, Sec. 209, purporting to be an extract from the Mit. "On the Retraction of Gifts," but which is not to be found there. That Section is a commentary on *Yājñavalkya*, Bk. II. Sl. 175, the sense of which is that a man may bestow his own in so far as he does not thereby injure the family, but never his whole property while his posterity survive. *Vijñāneśvara* expounds "svam" in the *Smṛiti* as meaning "ātmyam" (= specially his own, or personal property, as contrasted with the common estate). He divides things with reference to gift into four classes, alienable and inalienable, and (the usual forms of alienation having been gone through) into alienated and unalienated. In distinguishing the first two classes he repeats that of a man's (proprium) self-acquired property only so much is alienable as exceeds the family's needs. As a ground for the limitation he insists on the paramount right of the family to support. To establish this he quotes *Manu's* text: "Aged parents, an honourable wife, an infant child, must be maintained even through a hundred trespasses." (Comp. *Manu* VIII. 389). Presently afterwards he incidentally quotes *Nārada* (see Transl. p. 59) to the effect that a man having issue must not alienate his whole property. Lastly he construes the text as forbidding the alienation of the whole property, however completely one's own, that is though self-acquired, while issue (son or grandson or the like "putra-pantrādi") survive. Thus the obligation imposed by *Manu*, so far from being treated as exceptional or as limited to the literal sense of the precept, as Mr. *Strange* must have thought, is made an example of the duty to the family generally. The precept that he who has begotten a son and performed his tonsure shall provide for his sustenance is relied on for the rule that the alienation of his (proprium or personal i.e.) self-acquired property is subject to restrictions so long as posterity exist. The Section of the *Mitāksharā* is translated in the Appendix. It is in accordance with the chief Hindu authorities that *Jagannātha* says: "If the person entitled to subsistence be not excessively vicious and the householder being mad give away his estate the donation is void," *Coleb. Dig.* Bk. II. Chap. IV. Text XV. Comm. See also *Steele*, L. O. 68. If the family of an outcast son can claim maintenance it seems that the right subsists

asserted (a) and denied. The actual decision in the latter case did not necessarily involve an absolute negation of the right as it was limited to a statement that "as long as she elects to live with her own father she has no legal right to be maintained by her father-in-law," (b) a rule quite in accordance with the native authorities (c) and the customary law of Bombay; but it was said that "a daughter-in-law has no legal right to be maintained whether she lives with her father-in-law or not." This is opposed to the Hindû authorities (d) and to the custom of the Bombay presidency. Where there was ancestral property it is opposed in its result to the recent Bombay decisions; but it agrees with them in principle, and has been relied on in them as an authority. (e) If the right of a widow of a son, or other member of a united family, depends altogether on her deceased husband's having been, not a co-member of an undivided family, but a joint owner of property with the surviving members against whom the widow's claim is directed, then as the son in Bengal does not in any practical sense become a co-owner with his father by birth, he cannot, on his predecease, leave anything out of which his widow can claim maintenance. That this is not the real basis of the widow's right has been shown in the Introduction to Book I., (f) but it seems unlikely now that the Hindû theory should reassert itself against that by which it has been replaced.

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equally where the son has died. See Coleb. Di. Bk. V. T. 334, and comp. Vivâda Chintâmani, Trans. p. 291.

(a) *Musst. Heera Kooree v. Ajoodhya Pershad*, 24 C. W. R. 475.

(b) *Khetlu Monee Dossee v. Kasheenath Doss*, 10 C. W. R. 89 F. B.

(c) See Vyav. May. Chap. IV. Sec. 8, para. 7; Stokes, H. L. B. 85; Nârada, Dâyahâga, paras. 28, 29, Transl. p. 98; above, pp. 232, 254 ss.

(d) Above, pp. 232, 254, 257, 363, 408, 436. The Viramirodaya, in arriving at the conclusion that women are generally incompetent to inherit says "The daughter-in-law and the like are entitled to maintenance only." See Transl. p. 244.

(e) See *Savitribai v. Lazmibai*, I. L. R. 2 Bom. at p. 617.

(f) Above, pp. 239, 246 ss. Comp. Coleb. Dig. Bk. II. C. IV. T. 28 Comm. in med. on the mother's right.

Subject to any qualifications which the recent decisions have introduced, it may be said that the daughter-in-law's right, like every coparcener's widow's right, to maintenance has always been recognized in the Bombay presidency (a). In the case of *Ramkoonwur v. Unimur et al*, (b) a daughter-in-law and her daughter were pronounced entitled to maintenance by the step-mother-in-law, who had succeeded to the father-in-law's property. The mother-in-law was pronounced incompetent to dispose of the immoveable property. At 2 Macn. H. L. 111 it is similarly laid down that a widowed daughter-in-law is entitled to board and residence with her mother-in-law, but not to an allowance if she choose to live apart. (c) The latter part of this rule may now probably be held superseded by the decisions, except perhaps where it can be maintained as a caste law.

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(a) See above, pp. 246 ss. 436; 1 Str. H. L. 124, 172, 244; 2 *ibid.* 412, 235, 233, where Colebrooke (referring to Mit. Chap. II. Sec. 1 and 2, Stokes, H. L. B. 364-380,) and Sutherland recognize the daughter-in-law's right in a case wherein the deceased son had no separate property. At page 297, Colebrooke, referring to Mit. Chap. II. Sec. 1, p. 7 (Stokes, H. L. B. 429), says that even half-brothers of a widow's deceased husband are bound to maintain her. See the case of *Savitribdi v. Laximibdi*, I. L. R. 2 Bom. 573, discussed above, pp. 235 ss. In *Apaji Chintaman v. Gangabai*, Bom. H. C. P. J. 1878, p. 127, a widow's claim against her brother-in-law to a pecuniary allowance and the expenses of a pilgrimage was rejected. See *Ambawow v. Rutton Krishna et al*, Bom. Sel. Ca. p. 150. The decision in *Chandrabhagabai v. Kasinath*, above p. 234, is supported by 1 Str. H. L. 172, but cannot be thought consistent with the more recent decisions. As to the measure of maintenance of a predeceased coparcener's wife see 2 Str. H. L. 291, 294, 299; *Satyabhāmābāi v. Lakshman Ramchandra*, Bom. H. C. P. J. 1880, p. 62. Some of the elements in determining what is a suitable maintenance for a Hindū widow out of her deceased husband's estate were considered in *Sreemutty Nittokissoree Dossee v. Jogendro Nauth Mullick*, L. R. 5 I. A. 55.

(b) 1 Borr. 458.

(c) See also Book I. Chap. I. Sec. 2, Q. 23, 24; Chap. II. Sec. 1, Q. 6, 17; Sec. 3, Q. 9; Sec. 6A, Q. 27, 28; Sec. 7, Q. 10; 2 Str. H. L. 235.



Where a separate maintenance has been awarded, it may be increased or diminished upon proper cause shown. (a) The order may be made subject to variation. (b) Arrears may be awarded (c) contrary to the opinion of the Śāstri, (d) who thought the widow entitled only to maintenance from day to day. The case of *Saruswatee Bae v. Kesow Bhut*, (e) taking the Śāstri's view, is counterbalanced by that of *Sakvār-bái v. Bhavánji Raje* (f) which regards the point as unsettled. A widow's right to maintenance cannot be sold in execution of a decree or otherwise transferred. (g) It is a proper course to make an investment in order to secure the maintenance. (h) Limitation barring a claim for maintenance

(a) See *Sreeram Buttacharjee et al v. Puddomokee Debia*, 9 C. W. R. 152 C. R. ; *Ram Kullee Koer v. Court of Wards*, 18 C. W. R. 478; *Rukka Bai v. Gonda Bai*, I. L. R. 1 All. 594. Above, p. 262.

(b) Above p. 265; *Nubo Gopal Roy v. S. Amrit Moyee Dossee*, 24 W. R. 428, and cases under (a), and *Ranchandra Vishnu v. Sagunbái*, Bom. H. C. P. J. 1879, p. 450. A Court is not justified in reducing, as a punishment for a vexatious defence to a suit, the amount of maintenance which it would otherwise have awarded, *Sreemutty Nittokissoree Dossee v. Jogendro Nauth Mullick*, I. R. 5 I. A. 55. See *Moniram Kolita v. Kerry Kolutany*, above, p. 258. Where maintenance was withheld the Śāstris have in several instances recognized a right in the widow by a kind of *pignoris capio* to seize a part of the estate for her support. Comp. the cases under Sec. 3 A, above, p. 653, note (d).

(c) *Venkopadhyaya v. Kivari Hengusu*, 2 M. H. C. R. 36.

(d) *Ramachendra Poy v. Luxoomy Boyee*, M. S. D. A. R. for 1858, p. 236.

(e) 1 Morr. 247.

(f) 1 Bom. H. C. R. 194.

(g) *Bhyrub Chunder v. Nubo Chunder*, 5 W. R. 112; *Ramabai v. Ganesh Dhonddev*, Bom. H. C. P. J. 1876, p. 188. See above, pp. 254, 302.

(h) Above, pp. 79, 163. As to a concubine's right to maintenance out of a family pension, see 2 Str. H. L. 32. But where a Saran-jámdár had made a grant of land to a lady it was held that she could not retain it against the will of his descendant, as the Government

runs only from the time when maintenance was refused or the right denied. (a)

# V.—RIGHTS AND DUTIES ARISING ON PARTITION.

§ 7. The rights and duties of the coparceners towards each other, arising upon partition, relate to

- A. The determination of the shares to which the sharers are severally entitled.
- B. The distribution of the common liabilities :—
  1. Of debts.
  2. Of other liabilities.

A. With respect to the determination of the shares for actual enjoyment, this has regard only to the property as it actually subsists without allowances for previous inequalities of expenditure. (b) In the case of an enforced partition

had, in bestowing the *Saranjám*, intended it, as they declared, as a "provision for an ancient house" inalienable from the family, *Jamne Sani v. Lakshmanrao*, Bom. H. C. P. J. 1881, p. 6.

(a) *Timmappa Bhat v. Parmeshriamma*, 5 Bom. H. C. R. 130 A. C. J.; *Narayanrao Ramchandra v. Ramabai*, L. R. 6 I. A. 114; *Rámchandra Dikshit v. Sávitribái*, 4 Bom. H. C. R. 73 A. C. J.; Act XV. of 1877, Sch. II. 129. See above, pp. 261, 262.

(b) See above, "SEPARATION;" Coleb. Dig. Bk. V. Chap. VI. T. 377, 378; *Chuckun Lall Singh v. Poran Chander Singh*, 9 C. W. R. 483 C. R., where however what is said as to a manager's accountability to a minor coparcener, is opposed to Coleb. Dig. Bk. V. T. 136, and *Viram*. Tr. p. 41, 247. At 5 B. L. R. 347 (*Abhaychandra Roy Chowdhry v. Pyarimohan Guho et al*) also it is said that a manager is liable to render an account to the other members of the joint family; but this is to be taken only in a qualified sense, at least in Bombay. See also the case of *Ranganmani Dasi v. Kasinath Dutt et al*, 3 Beng. L. R. 1 O. C. J. As to charges that may be thrown solely on the manager's share, see 2 Str. H. L. 339-345. See also the case of *Appovier v. Rama Suba Iyen et al*, 11 M. I. A. at p. 89; *Joitárdm Bechur v. Bai Gangá*, 8 Bom. H. C. R. 228 A. C. J.; *Lakshman Dada Naik v. Ramachandra Dada Naik*, I. L. R. 1 Bom. 561; *Dâyakrama-Sangraha*, Chap. VII. para. 29; Stokes, H. L. B. 512. A liability does not arise to account for assets until they are realized, *Lakshman Dada Naik v. Ramchandra D. N.*, I. L. R. 1 Bom. 561. If only one member

complete accounts must be taken. (a) Securities are to be given up to the Court, and if necessary a receiver and manager is to be appointed. (b) All the coparceners must be before the Court. (c) (Kâtyâyana says) "The unequal consumption of unseparated kinsmen shall not be removed (= rectified). The purport is that unequal consumption cannot be prevented as it is unavoidable." (d) This is the view expressed by Sir C. Turner, C. J., in *Madras*, (e) and by Melvill, J., in *Konerav v. Gurav*, (f) in which case there had been not only joint enjoyment but a separate enjoyment of portions by different members but in the exercise of the common right. The Supreme Court of Bengal throw out an opinion (not deciding the point) in *S. Soorjeemoney Dossee v. Deenoo-*

separates there is merely a computation and a severance of his share, *Steele*, L. C. 214. The customary law in most castes is very jealous of a single parcener's right to acquisitions made by himself, especially as to immoveable property. Traditional sentiment, unreasonable as it is, connects such property at once with the whole family, *see Steele*, L. C. 401. All that has been gained by individual parceners therefore, is generally an accession to the estate to be divided, (*see above*, p. 725 ss.) though the Smritis, as *Vasishtha*, Chap. XVII. para. 26, recognize the acquirer's right to a double share, or as *Gaut.* Chap. XXVIII. para. 27, to the whole gain of learning. Where a business was carried on in a son's name it was still presumed to be joint property, *Narayan Jivaji v. Anaji Konerrao*, Bom. H. C. P. J. 1883, p. 91.

(a) Three sons out of six sued for partition of an estate wrongly maintained to be impartible. They were awarded their moiety and three years' arrears on an account of income and of expenditure for the benefit of the joint family, *Rajah Venkata Kanna Kamma Row v. Rajah Rajagopala Appa Row Bahadur*, L. R. 9 I. A. 125.

Here, the claim having been wrongly resisted, the relief to the plaintiffs was substantially put on the same footing as if that had been done which ought to have been done.

(b) *Rangrav Subrav v. Venkatrav Vithalrav*, P. J. 1878, p. 184.

(c) *Rakhmaji v. Tatia Ranuji*, P. J. 1878, p. 188.

(d) *Viram*. p. 245, 247, which also pronounces a co-sharer answerable for positive fraud.

(e) *Ponnappa Pillai v. Pappuváyyangár*, I. L. R. 4 Mad. at pp. 59, 60.

(f) I. L. R. 5 Bom. 589.

*bundoo Mullick*, (a) that inequalities of expenditure are commonly in the present day taken into account on a partition, and that, according to Coleb., Dig. Bk. V., T. 373, a co-sharer is liable for sums expended on personal enjoyment, not for the benefit of the family. (b) The question is discussed at some length in the case of *Meghashâm v. Vithal-râo*, (c) from the judgment of which, as it is not reported, the following extract may be given :—

“As to the next two objections, the object in taking accounts with a view to partition of an estate must, in the absence of fraud or gross misconduct, be simply to ascertain the existing nature and value of the property. The Hindû Law does not subject each and every member of a united family to an account of the portions taken by him from the common stock, and make him liable to restore all that he has taken in excess of his proper proportional share. So long as the family subsists undivided, it is regarded by the law rather as an integral unit in the community than as an aggregation of members, with reciprocal duties and rights admitting of precise arithmetical definition, and completely enforceable by the state. This, which was a common and prevailing conception in the earlier ages of the world, as Sir H. S. Maine has shown in his *Ancient Law*, pages 134, 183, is supported as to the Hindû community by many texts of recognized authority. Kâtyâyana, quoted by Jagannâtha in his *Digest*, Bk. V. Chap. III. T. 136, says ‘Let not a co-heir be obliged to make good what he expended before partition.’ There is even added this precept, ‘Effects which a kinsman has embezzled, let not a co-heir use violence (compulsion) to make him restore.’ So intimate down to the period of partition is the union of the family

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(a) 6 M. I. A. 540.

(b) “A coparcener is not, as a rule, entitled to an account against another in respect of payments made by the former.” Hence the Court inferred that one could not sue another in union for contribution towards land tax paid by the former, *Nanabhai Valabhdas v. Nathabhai Haribhai*, Bom. H. C. P. J. 1880, p. 154.

The position of the coparceners may in this respect be compared to that of a husband and wife liable to each other for positive fraud, but not for ordinary inequalities of expenditure.

(c) S. A. No. 148 of 1871, decided 14th September 1871, Bom. H. C. P. J. F. for 1871.

that protection otherwise than by remonstrance against unauthorized individual appropriations, is hardly thought compatible with it. Even in Bengal, where the power of each member of a united family to deal with his own share of the property has long been recognized, traces of the earlier and more general system are still very easily discovered; Jīmūta Vāhana (Dāyabhāga, Chap. XIII., Stokes H. L. B. 355-360) treating of this very subject of embezzlement or unauthorized appropriation, denies to it a strictly criminal character like theft; for he says, in accordance with the law of the Benares and Western Schools, though not with his own previous precepts, 'previous to partition a discriminative (several) property referable to particular persons relatively to particular things is not perceived.' A similar principle underlies the reasoning of Jagannātha in his Commentary on Texts 136 and 378 of Bk. V. of Colebrooke's Digest, and it is to be observed that the ancient texts are much more curt and decisive in their original form than as toned down by the glosses of more recent commentators. The position and responsibilities of the Kartā or manager do not at present differ materially from those of any other member of the family. He holds a precarious office from which he may at any moment be deposed by the general wish of the family. He is not a trustee required as in ordinary cases of trusteeship to keep accounts of his own expenditure, or of that of the other members, or of supplies taken out of the common stock. (a) The remedy for his misconduct is his deposition, or a partition of property in which, as will be seen, an adequate account can in general be taken.

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(a) In the recent case however of *Doorga Persad v. Kesho Persad Singh*, L. R. 9 I. A. 27, it was contended that Shev Nandan Persād, the elder uncle of two infants, had represented them sufficiently in a suit as defendant, he being their co-proprietor and manager of the estate, and having been retained as their guardian on the record when their mother's name as guardian was struck out. The Judicial Committee say that "the manager.....is not the guardian of infant co-proprietors.....for the purpose of defending suits against them in respect of money advanced with reference to the estate." Reference is then made to Act XL. of 1858, corresponding generally to Act XX. of 1864. This says: "the care of the persons of .....minors.....and the charge of their property shall be subject to the jurisdiction of the Civil Courts;" and again "Every person who shall claim a right to have charge of property in trust for a minor under a will or deed or by reason of nearness of kin or otherwise may apply to the Civil Court for a certificate of administra-

"As regards a minor this remedy is not to the full extent available. He cannot himself join in deposing a Kartâ or make a claim for a partition. It is not reasonable that he should suffer by the mere misfortune of his possessing no friend so interested in his welfare as to bring a suit in his name for a partition. The Hindû law appeals as emphatically (Colebrooke, Dig. Bk. II. Chap. IV. T. 17) as the English to reason, the reason of the law (Coke, I. Inst. L. II. S. 138), and the misappropriation, which a minor is powerless to check at the time, he may yet claim to have remedied as soon as he is *sui juris*. Gross and reckless waste, as well as down-right fraud, which an adult coparcener would have guarded against by insisting on partition, forms a proper ground of action on the part of one who could not at the time adopt that remedy. Yet mere ordinary extravagance does not entitle a minor on attaining his majority to an account of sums expended, and a compensation for those in excess of the Kartâ's proportional share, for which the texts of the Hindû Law make no provision, and which would be plainly opposed to its fundamental principle of the integrity of a family united in sacra (Maine A. L. 192) and in interests. If such an account could be exacted indeed, the birth of a son would imme-

tion; and no person shall be entitled to institute or defend any suit connected with the estate of which he claims the charge until he shall have obtained such certificate." On this it is said "No certificate was obtained by Shev Nandan Persâd, and although it is stated that he was guardian of the infants, he clearly was not the legal guardian, and had no right to defend the suit in their name. The decree in the suit therefore was not binding on the infants." Yet as the debt had originally been that of their father they were held responsible for one-sixth, which it seems was the share assumed by some one on account of the infants in a partition (comp. p. 613, *supra*). It does not seem that Sheo Nundan really sought or held charge of joint property in trust for the minors. As senior member of a united family, he would be their joint tenant if any English law-term is appropriate, holding every part of the property as his own, (*per mie et per tout*) accountable in no other way than as the Hindû law makes a managing member of a family accountable for gross malversation. As manager he could, according to most of the decisions represent the aggregate interests of the family in the Civil Court (*see above*, p. 615). The family however had manifestly become divided when the nephews by their suit sought exoneration from liability. This division may have occurred before the suit against Shev Nandan and the nephews. In that case they might remain co-proprietors with

diately impose on his father the necessity of recording every item of income and expenditure. The adult member of a family, who sees a way opening by which he may attain opulence, cannot easily free himself from the embarrassment of minor members entitled to share his gains, and the same closeness of connexion, which thus makes them sharers of his gains, (a) makes them sharers also in the losses occasioned by his indiscretions, so long as these do not proceed to an outrageous length.

"It must, therefore, in a suit, brought by a Hindû on attaining his majority, for partition against the other member or members of his family, always be a matter very much within the discretion of the Court to determine whether all just and reasonable bounds of expenditure have been so exceeded that the member sued may properly be made responsible for the excess. The social position of the

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Shev Nandan as manager, and still hold separate interests like tenants in common under the English law. Such separate interests could not be taken charge of without breaking up the integrity of the estate essential to the united family. In the beginning of the report however the uncle and nephews are described as members of a joint Hindû family. If in such a case the joint right of infant members along with the manager is a property which can be taken charge of by way of trust, and must be so taken for proceedings at law, the manager is necessarily deposed from the place assigned to him by the Hindû law. The distinction of rights is in fact incompatible with a continuance of the joint family as shown in *Appovier's case*, see above, pp. 699, 703.

On the point of whether the decree obtained by the creditor could bind the infants without their having been represented by a guardian, their Lordships say: "It is not necessary now to inquire, because the Courts below went into the question of whether the bond was given for a debt for which the infants were liable, and held that it was not." But the High Court had decreed that the infants were liable and must pay the share of the debt apportioned to them. This, according to the view taken in the Judicial Committee was opposed to the principle laid down in *Deen Dayal's* and *Suraj Bunssee Koer's* cases, but the decree of the High Court was affirmed. The case thus presents difficulties and has perhaps been imperfectly reported.

(a) Though the cleverest of a family take the management from an inefficient senior, and make gains, he is not therefore entitled to a larger share than his brethren in partition; Steele, L. C. 397. But he is entitled to a recoupment of losses sustained or of debts paid out of his separate property on the joint account; Steele, L. C. 213, 214.

parties, the recognized customs of their class, and many other circumstances may be taken into account; and the presumption, in the absence of evidence, is always that the estate simply as it subsists at the moment of the suit is that of which the claimant can demand his proper aliquot part. (a) For the event of fraud distinct provisions are made. The Vyavahāra Mayūkha (b) lays down what is to be found in many other works, that the brother, who by concealing the extent of the property defrauds co-heirs, shall be punished by the King; and property whether purposely concealed or accidentally omitted from the partition is everywhere recognized as a proper subject on its discovery for a further distribution on the same principle as the former one.

“As to the determination of what the subsisting estate really is, what the Hindū Law prescribes as a test in doubtful cases is an application of the Kosha ordeal. (c) We have got beyond that stage of progress in which so rude a method of investigation can any longer be effectual, as once sometimes it was, by its operation on the conscience of the person exposed to it. The more practical method of an enquiry into facts as they can be proved by testimony must be pursued, as that which, however imperfect, is the one that can be applied with the best hope of success. This resolves itself virtually in a case like the present into the preparation of an account on the principles already laid down of the existing property and of those further sums, if any, for which the person sued may properly be made answerable.” (d)

(a) See the remarks of Jagannātha in Colebrooke, Dig. Bk. V. T. 374; *Venkatesh v. Ganpaya*, Bom. H. C. P. J. 1876, p. 110; *Ridhakarna v. Lakhmichand and others*, P. J. 1878, p. 238; *Konerrav v. Gurrav*, I. L. R. 5 Bom. 589. In the case of *Appa Rāv v. The Court of Wards*, I. L. R. 5 Mad. 236, the same principle was acted on by the Privy Council. The plaintiffs were awarded as against the defendants their moiety of a Zamindāri and of the mesne profits from the time of their dispossession, but subject as to the profits to the statutory limitation of three years before the institution of the suit. The moiety of the estate would necessarily, in the absence of a special direction, be a moiety of it as it existed at the time of the plaintiffs' ouster.

(b) Chap. IV. S. 7, para. 24; Stokes, H. L. B. 79.

(c) Vyav. May. Chap. IV. Sec. 6, para. 3 (Manu, cited Colebrooke, Digest, Bk. V. T. 374); Stokes, H. L. B. 73.

(d) See also below, Bk. II. Chap. II. Sec. 1, Q. 9; Chap. III. Sec. 2, Q. 4, Remarks; Steele, Law of Caste, 53, 208.



The partition is regulated by the nature of the property, as 1. divisible, or 2. naturally indivisible. In the former case the partition proceeds regularly by a distribution in specie of portions amongst the sharers. The amount of the portions varies according to the status of the sharer in the family, and, in some cases, according to the nature of the property.

We have to distinguish

a. The partition between an ancestor and his first three descendants.

(1) Of ancestral property.

(2) Of self-acquired property.

b. The partition between brothers and collaterals undivided.

c. Between coparceners reunited.

A. 1. a. (1) *Partition between ancestor and his first three descendants.*—On a partition between an ancestor and his descendants to three generations of ancestral property, the shares are equal. (a) As between the ancestor and each of his sons or the issue of each, and between the several sons or the representatives of each. (b)

(2) On a partition of self-acquired property made spontaneously by the head of the family, he may reserve for himself a double share. (c) But not if the partition be

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(a) Mit. Chap. I. Sec. 5. para. 8; Stokes, H. L. B. 393; Nārada, Pt. II. Chap. XIII. sl. 12. Traces of the ancient rule giving a larger share to the eldest son are still to be found. See Bk. II. Chap. I. Sec. 2, Q. 2, Rem.; Steele, L. C. 210, 218.

(b) In a few castes the sons share according to a *patnibhāg*, see above, pp. 285, 422, but in the great majority they take equally, Steele, L. C. p. 419, 420.

(c) Mit. Chap. I. Sec. 5, para. 7; Stokes, H. L. B. 392; May. Chap. IV. Sec. 4, para. 12; Stokes, H. L. B. 50. See Coleb. Dig. Bk. V. T. 388, Comm. *ad fin.* The limited power of a father over his patrimony and even over his own acquisitions may be looked on as

enforced by the descendants. This follows from the text which states that 'if the father makes a partition by his own desire, he receives a double share, (a) and is also particularly stated in the *Vīramitrodaya*. (b) The descendants take equal shares *per stirpes*; (c) unequal partition by deduction formerly recognized is not admitted in the present (Kali) age. Under the ordinary law, a father is not at liberty to dispose of his property in favor of one son to the prejudice of the others, either by way of gift *inter vivos* or by way of bequest. (d) As the Hindû Law, however, admits the father's right of disposal over self-acquired moveables there would be no objection to his making an unequal distribution of this portion of his property amongst

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the general rule in jurisprudence, wherever the family has risen to importance. In France and the countries which have adopted the French Code, the portion of which a father can dispose in his estate is limited to his aliquot part, counting himself and his children together. Thus with three sons he can by gift or by will alien only one-fourth of his property. To a wife however he may give one-fourth in full ownership, and the usufruct of one-fourth more, provided that if he were a widower with children when he married her she cannot have more than the smallest portion given to a child. The contradiction in some cases between these rules and the question of whether the widow's capacity as a beneficiary is or is not, where there is but one child, less extensive than that of a stranger, have given rise to discussions amongst the Continental jurists of Europe, at least as subtile and inconclusive as any with which Jagan-nātha and his precursors in India have been reproached.

(a) That this is the law only as to self-acquired property is stated in *Badri Roy v. Bhagwat Narain Dobey*, I. L. R. 8 Calc. at p. 653.

(b) Tr. p. 63, 65.

(c) *Debi Parshad v. Thakur Dial*, I. L. R. 1 All. at p. 113.

(d) *Bhujangrav v. Malojirdv*, 5 Bom. H. C. R. 161, A. C. J.; *Lakshman Dada Naik v. Ramchandra Dada Naik*, I. L. R. 1 Bom. 561; S. C. in App. L. R. 7 I. A. 181; Coleb. Dig. Bk. V. Chap. I. T. 27, 28; and *infra*, Bk. II. Chap. I. Sec. 2, Q. 2 and 5; Mit. Chap. I. Sec. 3, para. 4, Stokes, H. L. B. 382; May. Chap. IV. Sec. 4, para. 11, *ibid.* 50.

his sons. (a) The Bombay High Court has ruled (b) that “a father united with his son has full power to alienate self-acquired land,” which implies a complete power of disposal. (c) According to this principle, the head of a family would be equally unfettered in the distribution of his immoveable as of his moveable self-acquired property. (d)

(a) Mit. Chap. I. Sec. 1, para. 27, Stokes, H. L. B. 375; May. Chap. IV. Sec. 1, para. 5, *ibid.* 43. A testamentary bequest cannot be made so as to cause an unequal division of ancestral moveables, *Manakchand v. Nathu Purshotam*, Bom. H. C. P. J. 1878, p. 204.

(b) *Gangābāi v. Vāmandji*, 2 Bom. H. C. R. 304.

(c) See also *Muddun Gopal Thakoor et al v. Ram Buksh Pandey et al*, 6 C. W. R. 71 C. R.; *Bawa Misser et al v. Rajah Bishen Prokash Narain Singh*, 10 *ibid.* 287 C. R.; *Gunganath v. Joalanath et al*, N. W. P. S. D. A. R. for 1859, p. 63; and below, Bk. II. Chap. I. Sec. 2, Q. 2-8, Rem.; and Sec. 3, Q. 1, Rem. An unequal distribution of acquired property by the father is in some degree generally recognized by caste custom, subject only to the claims of the family to maintenance, and to protection against mere caprice. Steele, L. C. pp. 58, 62, 216, 408.

(d) But see also 1 Str. H. L. 20, 21; 2 *ibid.* 9, 11, 13, 439; and Coleb. Dig. Bk. II. Chap. IV. Sec. 1, T. 13, 14.

As to what is included in immoveable property according to the Hindū Law, see *Smṛiti Chandrikā*, Chap. VIII. para. 18 and note; Chap. XI. Sec. 1, paras. 44-48; *Jamiyatrdm v. Parbhudds*, 9 Bom. H. C. R. 116; *Maharana Fatesanji v. Desai Kalyanraya*, 10 *ibid.* 189 P. C.; *Baiji Manor v. Desai Kallianrai*, 6 *ibid.* 56 A. C. J.; *The Government of Bombay v. G. Shreegirdharlalji*, 9 *ibid.* 222; *Balvantrao v. Purshotam et al*, 9 *ibid.* 99; *Krishnabhat v. Kapabhat et al*, 6 *ibid.* 137 A. C. J.; *Bharatsangjee v. Navantdharaya*, 1 *ibid.* 186; *Sangapa v. Sanganasapa*, R. A. No. 40 of 1875, Bom. H. C. P. J. F. for 1876, p. 214; *Shivagavda v. Dharangavda et al*, R. A. No. 7 of 1875, *ibid.* for 1875, p. 144; *Sitaram Govind v. The Collector of Tanna*, S. A. No. 193 of 1874, *ibid.* for 1875, p. 141; *The Collector of Thana v. Hari Sitārām*, I. L. R. 6 Bom. 546. According to these decisions a hak or right appendant to an hereditary office or to membership of a group of village Māhārs is immoveable property within the meaning of the Limitation Acts, and is not personal property within the meaning of Sec. 6 of Act XI. of 1865 (the Small Cause Court Act for the Mofussil). Consequently the

An adopted son receives a fourth part of a share, if le-

Small Cause Courts have not jurisdiction in such cases even over claims for definite sums sued for as arrears. The contrary view, suggested by *Hanmantrav Sadashiv v. Keru*, Bom. H. C. P. J. 1875, p. 291, and *Naru Pira v. Naro Shidheshvar*, I. L. R. 3 Bom. 28, cannot safely be followed. The recent rulings have been embodied in Act XV. of 1877, Sec. II. Art. 132, which says that Malikana and Haks are for limitation to be deemed charges on immoveable property.

Tithes under the English statute law are hereditaments, and a rent was regarded in early times as an estate subject to the " assise " for possession; but all things of value not being land or interests in land (and some interests in land) are by the English law " personal property," a term by no means identical with moveable property, (see *Freke v. Lord Carbery*, L. R. 16 Eq. Ca. 461,) and peculiar to the English law, in the sense in which that law uses it. See Butler's note to Co. Lit. 191a, Sec. II. 2. A royal grant of an annuity therefore would be " nibandha " according to Hindû Law, but according to the English Law it would, unless issuing from land, be a merely personal inheritance. See Co. Lit. 20a, and Hargrave's note. In *The Government of Bombay v. Desai Kallianrai Hakoomatrai*, 14 M. I. A. at p. 563, the Judicial Committee say of a Palanquin allowance: " They are by no means satisfied that the allowance, though payable out of the Government revenue of a particular Pergunna, can properly be said to be ' immoveable property,' within the meaning of the clause in question. It did not constitute a charge which could be enforced against the land, or, since the year 1808, against the revenues of the land prior to the claim of Government. The utmost right of Dowlutrai after 1808, or his descendants, was to receive, after the perception of the revenues by Government, a certain annual sum of money out of the Collector's Treasury." In the case of *The Collector of Thana v. Hari Silâram*, I. L. R. 6 Bom. 546, a Full Bench on appeal from a decision in which the judgment of Sir C. Sargent, J., had prevailed against that of Melvill, J., upheld the former. In the judgment delivered by Sir M. Westropp, G. J., it is laid down that a grant to a temple of an annuity in cash and grain payable out of the extra assessments of particular divisions of a district is a charge on the districts, because the assessment is so. It is therefore, as a charge on immoveable property, itself immoveable property. This seems open to the logical objection that " charge " is used in a double sense. As a real right a charge being an interest in land is immoveable property, as a tax it is not.

gitimate sons of the body have been born after his adop-

(See *Ashton v. Lord Langdale*, 4 De G. and Sm. 402, compared with *Attree v. Hawe*, L. R. 9 C. D. 337, and *Jervis v. Lawrence*, W. N. for 1882, p. 157. A charge confers a right to realization by sale of that on which it is imposed. See Fisher, Mortg. Sec. 8; Transf. of Prop. Act, IV. of 1882, Sec. 100.) Again it is said that "a grant by a Hindû sovereign to a Hindû temple, which can only be held by the managers of the temple, is immoveable property, i.e. "*nibandha*." This seems to assume the point in issue. If not, then the question is whether "*nibandha*" is necessarily immoveable property, and to say that because some or even all immoveable property is *nibandha*, all *nibandha* is immoveable, is not a permissible conversion. "The question [is] whether the subject of the suit is in the nature of immoveable property, (see above p. 229) or of an interest in immoveable property, and if its nature and quality can be only determined by Hindû law and usage, the Hindû law may properly be invoked for that purpose." But the "nature and quality" of a temple grant having been thus determined, the question of whether it falls within the class of "immoveable property" is one of English construction, i.e. do its characteristics as ascertained (not the mere Hindû name by which it may be called) place the object within or without the comprehension of "immoveable property." This includes fixed objects and such incorporeal rights exercisable in immediate relation to them as the local law on that account recognizes as immoveable. The latter are *jura in re* carved out of the full ownership of the object of property. See Story, Conf. of Laws, Sec. 447; *Freke v. Lord Carbery*, L. R. 16 E. C. 461. A temple allowance payable by officials out of a tax levied by them, even a land-tax, does "not constitute a charge.....against the land," and therefore according to the Judicial Committee in *Desai Kalianrai's* case, 14 M. I. A. 551, cannot certainly be said "though payable out of the Government revenue of a particular parganna"... to be "immoveable property." (*ib.*) The opinion then may perhaps be hazarded that where the Hindû law in a matter explicable by it alone shows a particular right to be a *jus in re* over fixed property it may be regarded as included amongst immoveables, whether it be also *nibandha* or not, and that where the right is not a *jus in re* (a real right as it is called) it is not immoveable property even though it should be *nibandha* according to the Hindû law, as *ex. gr.* in case of a *nemnuk* (periodical payment) from the Government treasury. This agrees with the definition given in the General Clauses Act I. of 1868, and in the Registration Act III. of 1877. In the Limitation Acts subsequent to Act XIV. of 1859 (Acts IX. of 1871, XV. of

tion. (a) The illegitimate son of a Śūdra may also receive a share at the father's choice (b) ; but those excluded from

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1877), "Immoveable" must necessarily be construed according to the definition given in Act I. of 1868, Sec. 2. See also Wilks's Mysore, Vol. I. p. 126.

As to the English law respecting annuities, stocks and shares which are generally personal property, see Wms. Exec. Pt. II. Bk. III. Chap. I. Sec. 2. How these, when held by Hindūs, would be regarded now that "immoveable" and "non-personal" or "real" have been identified with "nibandha" (=productive of a permanent income) may be a question of some difficulty. Shares in the Government Banks, it is expressly enacted by Act XI. of 1876, Sec. 19, shall be "moveable property," and by Sec. 22 the Banks are free to ignore trusts to which the shares are subject except for the purpose of excluding the Bank's own claims for debts due to them from the registered shareholders. The Indian Companies Act, VI. of 1882, Sec. 44, provides similarly in the case of all Companies under the Act, that the shares shall not be "real estate or immoveable property." Annuities under the Indian Loan Act, 22 & 23 Vic. Cap. 39, Sec. 8, are declared to be personal property. Government loan notes, registered or enfaced for payment in London, are as assets of holder deceased declared personal property by St. 23 and 24 Vic. Cap. V. Sec. 1. In other cases the particular provisions of the constituting Statutes must be looked to, in order to determine the nature of the property, and then in the case of Hindūs the Hindū law will govern the relations of the representatives or co-owners of the deceased owner *inter se*. The property will, in the first instance, usually vest in the executor or administrator under Act V. of 1881, Sec. 4.

A pension, in the proper sense of a stipend proceeding from the bounty of the Government, is protected against attachment by the Pensions Act, XXIII. of 1871, Sec. 11, but a grant of money or land revenue, such as a "Toḍa Girās" Hak, is not exempt, though under the same Act it cannot be made the immediate object of a suit cognizable by the Civil Court, *Secretary of State for India v. Khemchand Jeychand*, I. L. R. 4 Bom. 432; *Syed Mahomed Isaack Mushyack v. Azeezoon Nissa Begam*, I. L. R. 4 Mad. 341; *Radhabai v. Ragho*, Bom. H. C. P. J. F. for 1878, p. 292.

(a) Mit. Chap. I. Sec. 11, para. 24, Stokes, H. L. B. 420; May. Chap. IV. Sec. 5, para. 17, *ibid.* 63.

(b) Mit. Chap. I. Sec. 2, paras. 1 and 2, Stokes, H. L. B. 426; May. Chap. IV. Sec. 4, para. 32, *ibid.* 55; 2 Str. H. L. 70. In the

a share are entitled to maintenance. (a) On a partition being made by a father, head of a family, his wives receive each a son's share, (b) in case they had received no Strīdhana. If they had received Strīdhana, they obtain half a share, i.e., so much as, together with their Strīdhana, will make up a son's share.

A son born to the father after partition inherits his wealth either solely or in common with sons who have become reunited with him. (c) The already severed sons are disregarded in a further partition between the father and sons in union with him.

higher castes he is entitled only to maintenance, *ibid.* 71. *Inderun Valungypooly Taver v. Ramasawmy Pandia Talaver*, 13 M. I. A. 141. The statement of the Pandits in the same case as to marriages between persons of different castes being unlawful except when sanctioned by the customary law of the castes, expresses the Hindū law as received in Western India; Steele, L. C. 29, 163, 166. But a woman, being of a somewhat higher caste, is received into her husband's, *ibid.* See above, pp. 83, 194, 263.

(a) 2 Str. H. L. 68.

(b) Mit. Chap. I. Sec. 2, paras. 8 and 9, Stokes, H. L. B. 379; May. Chap. IV. Sec. 4, para. 15, *ibid.* 51; and compare the Dāyakrama Sangraha, Chap. VI. para. 22, *ibid.* 512; and Smṛiti Chandrikā, Chap. II. Sec. 1, para. 39. The mother gets a son's share in every partition, *Lalljeet Singh v. Raj Coomar Singh*, 20 C. W. R. 336, and the other cases cited and followed in *Sumrun Thakoor v. Chunder Mun Misser*, I. L. R. 8 Calc. 17. A step-mother must live with her step-son to be entitled to maintenance, p. 358, Q. 6; but see also Intro. to Bk. I. Sec. 10. The Smṛiti Chandrikā, Chap. XI. Sec. I. para. 34, as quoted by the Vīram. Transl. p. 136, regards the widow of an undivided parcener as taking a portion of the common property for her maintenance only when the father-in-law, &c. are unable for some cause to protect her, as Nārada gives them guardianship with full power of control accompanying their liability for maintenance, Vīram. Tr. p. 138. Her right is intransferable, see above, pp. 254, 302.

(c) Mit. Chap. I. Sec. VI. paras. 1, 4; *Nawal Singh v. Bhagwan Singh*, I. L. R. 4 All. 427.

The share allotted to a wife or sister in partition becomes Stridhana heritable by her sons only in default of daughters, (a) or according to the Mayūkha in preference to daughters. (b) This rule is inconsistent with any intention to make property derived by a woman from her husband "revert" to his family on her death. Vijñāneśvara recognizes inheritance and partition equally as means by which a woman acquires property, and gives a single set of rules for the devolution of this property, all of which he calls Strīdhana. (c)

(a) Above, pp. 298, 308 ; Mit. Chap. I. Sec. VI. para. 2.

(b) Vyav. May. Chap. IV. Sec. II. Sec. X. paras. 25, 26 ; comp. p. 329, note (e), above.

(c) See Mit. Chap. II. Sec. XI. paras 1, 2, 3, 8 ss, on which Sec. VI. para. 2 serves as a comment. But for the prevailing doctrine see also above, p. 334, and comp. p. 781 below.

The widow's power of dealing with property inherited from her husband or given or bequeathed to her by him has recently been discussed by Scott, J., in a terse and comprehensive judgment which applies equally to a share taken in partition. The conclusion arrived at by the learned judge was that according to the law of Western India, the widow may dispose at pleasure of moveable property thus taken by her while subject to restrictions as to immoveables for the preservation of the estate, *Dāmodar Mūdhavji v. Tha'ar Parmanandas Jivandās*, 13th February 1883, citing the cases of *Bhagwandeem Doobey*, 11 M. I. A. at p. 573 ; *Rajender Narain v. Bija Gobind Singh*, 2 M. I. A. 181 ; *Bechar Bhagvan v. Bai Lukshmee*, 1 Bom. H. C. R. 56 ; *Pranjivandas Toolseydas v. Devkuvarbai*, 1 Bom. H. C. R. at p. 133 ; *Balvantrao T. Bapuji v. Purshotam*, 9 Bom. H. C. R. at p. 111 ; *Koonjbehari Dhur v. Premchand Dutt*, I. L. R. 5 Calc. 685 ; *Venkat Ramrao v. Venkat Suriyarao*, I. L. R. 2 Mad. 333. See also above, pp. 98, 100, 301, 334, 507. As to the quantum of the estate taken, see above, pp. 297 ss, 336 ss ; and as to an extension of this by express agreement, gift or bequest, pp. 184, 315, and *Koonjbehari's* case, *supra* : as to the widow's power of bequest, pp. 181, 219, 309 ; Vyav. May. Chap. IV. Sec. X. para. 9. Where a widow had inherited a house from her deceased son, and was alive, it was held that "whether her mortgage was made for such purposes as will render it valid against her successor after her death, is a question which it is not necessary to determine in the present suit." The mortgagee was awarded present possession,



§ 7 A. 1. b. *Partition between brothers or collaterals.*—On a partition between brothers the shares are distributed equally; on partition amongst collaterals, *per stirpes*. (a) As to the extent of the property, thus subject to equal partition, (b) *see above*, § 5 A, pp. 708 ss; § 7 A 1 a, pp. 770 ss.

If there has been a partial distribution giving part of its share to one branch, it is debited with so much in account with the whole body of co-sharers. (c) But there is no general mutual right to an account of past transactions. (d)

If previously to the separation a particular member had had sole possession with the assent of his coparceners of some portion of the estate, he may retain that portion, (e) and where a member had built a house out of his separate funds on a piece of the ancestral land, it was held that this

*Malapa v. Basapa*, S. A. No. 379 of 1880, Bom. H. C. P. J. for 1881, p. 43. A "reversioner," however interested, (*see above*, p. 96) is estopped from questioning the validity of an agreement in which he concurred and which he attested, whereby the widow of a person deceased, his mistress, and an illegitimate daughter by her, made a distribution of his property, *Sia Dasi v. Gur Sahai*, I. L. R. 3 All. 362. *See further* § 7 A. 1 b.

(a) *See Sumrun Singh v. Khedun Singh et al*, 2 Calc. Sel. R. 11; Coleb. Dig. Bk. V. T. 95, Comm.; Mit. Chap. I. Sec. 3, para. 1; Stokes, H. L. B. 381; Chap. I. Sec. 5, para. 1; *ibid.* 391; Smṛiti Chandrikā, Chap. VIII. para. 5; 2 Str. H. L. 286, 358, 393. A mother cannot enforce a partition on an only son, 2 Str. H. L. 290; but if a partition is made they take equal shares, Steele, L. C. 49, 56.

(b) A gift from a parent to one of the sons while undivided is exempted from partition, *Vīram. Tr.* 250. It must be of reasonable value; *above*, p. 211.

(c) *See above*, p. 698, note (b).

(d) *See above*, § 7 A, p. 763; *Konerrav v. Gururav*, Bom. H. C. P. J. 1883, p. 77. A duty to account arises from the time when a partition is wrongly refused. *Id.*

(e) *Sreenath Dutt et al v. Nand Kishore Bose et al*, 5 C. W. R. 208 C. R. The charge created by attachment of an undivided share and the effect given to it by an actual transfer of part of the property to the possession of an execution purchaser are to be distinguished from

did not become part of the family property subject to partition. All that the coparceners can claim in such a case is a proportionate addition to their shares by way of compensation for the land withdrawn from the general partition. (a) So in a case of partition of interests without one in specie. (b) In *Vithoba Bâvâ v. Haribâ Bâvâ*, (c) however, a house was divided, because built on family property. (d) In *Jotee Roy et al v. Bheechuck Meah et al*, (e) Phear, J., says that by a long holding in severalty with consent of other sharers, a member of the family acquires a right to have that particular portion of the ancestral estate assigned, on a partition, to his share, and that a lessee under him may compel him to assert this right. Such a lessee holding on after a partition under other co-sharers, their acquiescence in his lease is presumed after some years. A purchaser may build a wall on the part in his possession, and unless it is injurious, the Court will not order its removal. But there is no right, without permission, to injure the other's interests. (f)

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this case. But should the parcener in separate possession deal with the part so possessed effect would be given to the transaction so far as consistent with justice to the coparceners. See above, pp. 631, 633; *Pândurang Anandráv v. Bhâskar Sadâshiv*, 11 Bom. H. C. R. 72.

(a) 2 Macn. H. L. 152.

(b) *The Collector of 24 Pergunnahs v. Debnath Roy et al*, 21 C. W. R. 222.

(c) 6 Bom. H. C. R. 54 A. C. J.

(d) *Contra, Guru Das Dhar v. Bijaya Gobinda Baral*, 1 B. L. R. 108.

(e) 20 C. W. R. 289.

(f) *Lalla Bissumbhur Lall v. Rajaram et al*, 16 C. W. R. 140; *Bisambur Shaha v. Shib Chunder Shaha et al*, 22 *ibid.* 287. Under the English law when a partition is made each parcener is entitled to a deduction of the value added at his sole expense to the part assigned to him from the valuation of such part with which he is charged in the account with his co-owners, *Watson v. Glass*, L. R. W. N. for 1881, p. 167.

*Rights and duties arising on partition.*—The rule regarding adopted sons given above holds good here also. The illegitimate son of a Śūdra is entitled to half a share. (a) Regarding the interpretation of the term ‘half a share,’ see Book I., Introd. p. 72, 82. (b) On partition amongst brethren not only mothers, but step-mothers, paternal grandmothers, and step-grandmothers (c) receive a son’s or grandson’s share,

(a) If there be no legitimate offspring, he is entitled to share equally with a daughter’s son, 2 Str. H. L. 70. But the *Mitāksharā*, Chap. I. Sec. 12, paras. 1, 2 (Stokes, H. L. B. 466) postpones him to the grandson, except for half a share. So Yājñ. II. 134.

(b) See also above, pp. 379, 382, 383.

(c) Coleb. Dig. Bk. V. Chap. II. T. 85 Comm. *Mohabeer Pershad v. Ramyad Singh et al*, 20 C. W. R. 195; *Badri Roy v. Bhagwat Narain Dobey*, I. L. R. 8 Calc. 649; *Damodhur Misser v. Senabuttu Misra*, *ib.* 537. But the last quoted judgment says the step-mother takes her allotment only for life as a maintenance. As to this see above, pp. 303, 308, 310, 777. “The mother’s title to her share is not founded on her former property but on positive texts,” Coleb. Dig. Bk. II. Chap. IV. T. 28 *in med.*

In his wide construction of the term “Stridhana,” Vijñāneśvara is followed nearly a century later by Aparārka. This author says: “The word ‘Ādya’ is intended to include other kinds of woman’s property; that for instance acquired under Yājñavalkya’s texts, ‘The wives must be made partakers of equal portions’; ‘Let the mother take an equal share’; ‘Sisters take a quarter of a brother’s share’; ‘Daughters share the nuptial present of their mother.’ Everything else (in like manner) over which a woman has control, is by Manu and the rest called woman’s property,” (Stridhana.) In *Sibbosondery Dabia v. Bussoomutty Dabia*, I. L. R. 7 Calc. 191, it was held that a suit by a grandmother would lie for an equal share with her grand-daughter and grandsons in the properties, which, under a previous partition decree, had been allotted to the representatives of her husband, and to a life-interest in the income of the property remaining unpartitioned.

In the mean time the widows are entitled to maintenance; see above, p. 259. But where two widows sought to enforce the terms of a partition deed, superseded by other arrangements, they were not allowed to turn their suit into one for maintenance, *Naro Trimback v. Haribai*, Bom. H. C. P. J. 1879, p. 33.

*Ganga Bai v. Sitaram*, I. L. R. I All. at p. 174, deals with the widow’s maintenance as a charge on the joint estate, a question which

provided they have obtained no Strīdhana. If they have obtained Strīdhana, they are then entitled to so much only as, with the Strīdhana, will make up their proper portion. (a)

On partition between brothers, the marriage expenses of the unmarried brother form a charge on the whole fund to be divided, and are to be provided for by a deduction there-

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is discussed at length in *Lakshman Ramachandra et al v. Satyabhamabai*, I. L. R. 2 Bom. 494, S. C. ; Bom. H. C. P. J. F. for 1877, p. 349. The precepts of the Śāstras on the subject of the widow's residence have been variously construed, even by the Native commentators, as may be seen by comparing the *Vivāda Chintāmani*, p. 265, with *Jīmūta's Dāya Bhāga*, Chap. IV. Sec. 1, para. 8 (Stokes, H. L. B. 237), and *Coleb. Dig. Bk. V. T. 483*, with *Varadrāja*, p. 50.

(o) *Mit. Chap. I. Sec. 7, paras. 1 sqq.* ; Stokes, H. L. B. 397 ; *May. Chap. IV. Sec. 4, paras. 18 and 19, ibid. 52.* See *Bk. I. Chap. IV. B. Sec. 1, Q. 10, Remark, p. 507* ; *Coleb. Bk. V. T. 87, Comm.* ; *Jodoonath Dey Sircar et al v. Brojanath Dey Sircar et al*, 12 B. L. R. 335. The share given to a mother, &c., on partition, may, according to *Jagannātha*, be dealt with by her at her own pleasure, but, on her death, is inherited by her husband's heirs. He distinguishes between property originating in a gift on account of affinity, and in affinity alone, *Coleb. Dig. Bk. V. T. 87.* But see *Nort. L. C. 295.* The texts cited there may, however, be differently explained. In the case of a widow of a coparcener put on a partition amongst survivors, into possession of a defined share, the Privy Council say, in *Bhagwandeon Doobey v. Myna Baee*, at 11 M. I. A. 514 :—"It may be a question whether her share does not become absolute, though in a case coming from Lower Bengal, the contrary was decided by this Committee." Prof. H. H. Wilson, Vol. V. of his Works, p. 26, favours her absolute power of disposal. *Coleb.*, in 2 Str. H. L. 383, says the *Mit.* and *Madh. Āch.* treat the allotment as an absolute assignment, contrary to the *Smṛiti Chandrikā* ; see above, pp. 298, 303, 307 ss, 338. She holds only the position of a tenant for life however, and has no right to destroy buildings, according to *Umapā Kantapā v. Ningosā Hirdsā*, S. A. No. 123 of 1876, Bom. H. C. P. J. F. for 1876, p. 144. See further below, p. 782, note (d).

The construction of a deed, allotting money, &c., to a widow of a deceased coparcener, may be made according to the situation of the parties, *S. Rabutty Dossee v. Sib Chunder Mullick*, 6 M. I. A. 1 ; *Boyle Chund Dutt v. Khetterpaul Bysack*, 11 B. L. R. 459.

from, but not those of a brother's son. (a) A mother's share is equal to a son's. (b) A sister's share is one-fourth of a brother's. (c) Colebrooke, resting on the Mitāksharā, makes this allotment an absolute assignment of a share, (d)

(a) 2 Str. H. L. 286, 288, 338, 423; Mit. Chap. I. Sec. 4, para. 19 (Stokes, H. L. B. 388); Sec. 5, para. 2 (*ibid.* 391); Sec. 7, p. 4 (*ibid.* 398); Viram, Tr. p. 81; Steele, L. C. 57, 214, 404.

(b) 2 Str. H. L. 296; Mitāk. Chap. I. Sec. 7, para. 1. In Bengal a mother is entitled to obtain a share as representative of a deceased son, *Jugomohun Holdar v. Sarodamoyee Dossee*, I. L. R. 3 Calc. 149.

(c) 2 Str. H. L. 288, 366; Mit. Chap. I. Sec. 7, p. 5-14; Stokes, H. L. B. 398-401; May. Chap. IV. Sec. 4, paras. 39, 40 (*ibid.* 57); Viram. Tr. pp. 84, 85. Nārada, Pt. II. Chap. XIII. sl. 13, says that the eldest receives a greater share, the youngest a smaller, and the others equal shares, as also a sister unmarried. The variance of precept is explained by the Smṛiti Chandrikā, Chap. IV. as having reference to the extent of the estate, the sister's claim on her brothers being greater in proportion as the aggregate is smaller. Devāṇḍa Bhaṭṭa adds that, failing the patrimony, the brothers must perform their sister's marriage out of their own funds, as the Viramitrodaya, Tr. p. 81, imposes the duty of initiation on the brethren even though they have inherited nothing. In the case at 2 Str. H. L. 312, the Śāstri, apparently with the concurrence of Colebrooke, on a partition claimed by one of four nephews against his brothers and uncles, directed that the property, being divided first amongst the different branches, sprung from the common stock, the portion allotted to the plaintiff's branch should be distributed between him and his brothers, subject to a charge for the maintenance and marriage of their sisters.

(d) Mit. Chap. II. Sec. 1, p. 32 (Stokes, H. L. B. 436); 2 Str. H. L. 383; Vyav. May. Chap. IV. Sec. 4, para. 18 (Stokes, H. L. B. 52); Sec. 10, p. 2, 7, 9 (*ibid.* 98, 100). Ellis, at 2 Str. H. L. 404, says:—"The daughter is heir of her father as well as the sons," but that is perhaps putting it rather too strongly. If the share allotted to a widow is to be regarded as an estate of the same character as that which she inherits, the recent decision of *Dhondo v. Balkrishna*, Bom. H. C. P. J. 1883, p. 42, is pertinent, which reiterates the rule that a widow is debarred from alienating the estate apart from any claims of her husband's relations, *see above*, pp. 100, 101. According to the caste usages generally, her disability to alienate fixed property is dependent on there being male relatives of her husband, Borr. Col. Lith. 46, 64, 92, 103, 230, 367. Some say relatives not more remote than nephew's

though some other commentaries regard it merely as a provision held for life, like property, as they insist, inherited or taken by gift from the husband. (a) Regarding the share allotted on a partition to a sister or widow however, as absolutely assigned, it may perhaps still be looked on, according to the analogy of the estate taken by a father in a division, as hereditary property for the purposes of further descent, and as, on that principle, going on the death of the widow to the heirs in the husband's family, who being nearest to him are, for this purpose, nearest to the widow. This may possibly have been the view of Nīlakaṇṭha, in the Vyav. May. Chap. IV. Sec. 10, paras. 26, 28, (b) and would make her position similar to that of a widow of a separated coparcener as thus conceived. (c) The Mitākṣharā makes the share simply Strīdhana, (d) inherited as described in Bk. I. Introd. pp. 146, 310; and in Bk. I. Chap. IV. pp. 501 ss, 517 ss. (e)

§ 7 A. 1. c.—*Partition between reunited coparceners.*—In the case of a partition between reunited coparceners, the shares are equal, notwithstanding that the portions brought

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sons, *ibid.* 325, comp. 349. Yet her daughter and daughter's son succeed to it, showing it is regarded as strīdhana, *ibid.* 103. Exceptionally she is allowed to dispose of what she inherited from her husband, *ibid.* 188, but not what she inherited from her father, *ibid.* 165. She may alienate to relieve her necessities, *ibid.* 248, or to pay debts and funeral expenses, &c., *ibid.* 281, though even in such cases the sanction of the kinsmen may be required, *ibid.* 303.

In 78 Dekhan Castes it was found that a widow could give away property if her husband had died divided from his family but not otherwise; Steele, L. C. 373. By some she is allowed to dispose even of immoveable property given by her parents, *ibid.* 236.

(a) See above, p. 777.

(b) Stokes, H. L. B. 105.

(c) Mit. Ch. II. Sec. 8, paras. 2, 7; Stokes, H. L. B. 85.

(d) See above, and 2 Str. H. L. 402.

(e) See also 2 Str. H. L. 411, 412; Steele, Law of Caste, 62, 63.

in on reunion were unequal. (a) Regarding the descent of shares in a reunited family, *see* Bk. I., Intro. pp. 140 sqq.

§ 7 A. 2.—*Partition of naturally indivisible property.*—Naturally indivisible property must be disposed of, so that the coparceners severally may derive from it the maximum of advantage, a principle readily deducible from the text of Brihaspati, May. Chap. IV. Sec. 7, para. 22. (b) Thus roads or ways, wells, tanks, and pasture-grounds ought to be used by all the coparceners. (c) The proceeds of an hereditary office are to be divided, or it may be enjoyed in turns. (d) Places of worship and sacrifice not being divisible, the coparceners after separation are entitled to their turns of worship. (e) Where such a mode of enjoyment is impractic-

(a) May. Chap. IV. Sec. 9, para. 2; Stokes, H. L. B. 92. The Smṛiti Chandrikâ, Chap. XII. para. 4, understands the prohibition against inequality to be directed only against the allotment of a quarter share to the eldest son, and allows an inequality in a new distribution proportionate to that of the shares brought in on reunion. This is expressly controverted by the Vyav. May., and is reconciled with Brihaspati's rule, "Brothers reunited share each other's wealth," only by a forced construction. *See* Smṛiti Chandrikâ, Chap. XII. para. 15; Chap. XIII. para. 14. The Smṛiti Chandrikâ, Chap. XII. para. 6, also assigns to reunited coparceners shares in any separate acquisition equal, for each, to half what the acquirer retains. *See* p. 698, note (b), and above, § 7 A. 1 b, p. 778.

(b) Stokes, H. L. B. 78; Vīram. Tr. p. 3; Coleb. Dig. Bk. V. T. 366, Comm.

(c) Steele, L. C. 60, 61.

(d) Steele, L. C. 216, 218, 229, from which it will be seen that local or family custom in many cases allows a greater or less advantage to seniority.

(e) *Anund Moyee et al v. Boykantnath Roy*, 8 C. W. R. 193 C. R. A refusal to deliver up an idol for the plaintiffs to perform worship was held by Pontifex, J., to constitute a cause of action, *Debendronath v. Odil Churn Mullick*, I. L. R. 3 Calc. 390. It is generally a privilege of the eldest to retain the household gods. Steele, L. C. 222, 417.

cable or inconvenient, the property may be sold, and its proceeds divided, or the rights of the coparceners otherwise equitably adjusted by agreement. Clothes in use, vehicles, ornaments, furniture, books and tools are to be kept by the coparceners who use them. (a) But *see* also above, § 5 B. *ad fin.*, page 730. As already pointed out (page 731) the family dwelling has by some been regarded as indivisible property. This doctrine has not been received by the Courts, except to the limited extent above indicated. A suit for the partition of a family dwelling may be brought by the purchaser at an execution sale of the rights of a coparcener, according to *Jhubboo Lall Sahoo v. Khoob Lall et al.* (b) But in Bombay a partial partition cannot be enforced. (c)

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A division of the right to worship may be made by assignment of turns, *Mitta Kanth v. Niranjun et al.*, 22 C. W. R. 433, S. C. ; 14 Beng. L. R. 166. Property dedicated to the service of a family idol is disposable only by the assent of all the members, and this cannot put an end to a dedication to a public temple, according to a dictum of Sir M. Smith, *Konwur Doorganath Roy v. Ram Chunder Sen*, L. R. 4 I. A. at p. 58. A religious fund or dedication is indivisible according to *Viram*. 249. *Narayan Sadanand v. Chintaman*, I. L. R. 5 Bom. 393, agreeing with *Rajah Vurmah Valia v. Ravi Vurmah Kunhi Kutty*, I. L. R. 1 Mad. 235, pronounces a religious endowment inalienable. It refers to *Khusálchand v. Mâhâdevgiri*, 12 Bom. H. C. R. 214, and many other cases ; but *Mancharam v. Pranshankar* I. L. R. 6 Bom. 298 S. C. Bom. H. C. P. J. 1882, p. 120, recognizing the general principle, allows an exception in favour of persons in the line of succession, referring to *Sitârámbhat v. Sitârám Ganesh*, 6 Bom. H. C. R. 250 A. C. J. Such a transaction does not defeat the intended succession ; it only accelerates it. In the absence of a son, and with the consent of the heir, a holder of a temple grant may alienate it for the maintenance of the worship, *Steele*, L. C. 237. By custom the rights of a particular 'tirth-upâdya' to minister to pilgrims is divisible and alienable, *Ib.* 85.

The interest of a temple servant in land held by him as remuneration may be sold in execution, *Lotlikar v. Wagle*, I. L. R. 6 Bom. 596.

(a) *Manu* IX. 200, 219 ; *Mit.* Chap. I. Sec. 4, pl. 16, 19.

(b) 22 C. W. R. 294.

(c) *See* above, p. 699.



A division of rents and other profits of land or houses called *Phalavibhāga*, is permissible, and constitutes a valid partition, though distinguished from the ordinary distribution *in specie*. The rule extends to the division of the profits of a *Vatandāri* village. (a) But such a distribution cannot be taken as conclusive of partition. (b) With the recent case quoted on this point, however, compare also *Somangouda v. Bharmangouda*. (c) The *Smṛiti Chandrikā*, Chap. XV., paras. 3, 4, says that a *phalavibhāga*, which has discriminated the rights of the co-sharers to the produce of the land, leaves them severally without a separate title to the land itself. (d) But this does not seem consistent with principle. (e)

§ 7 B. 1. *Debts*.—Debts due to the family may be distributed or assigned to a single member as part of his share. (f)

(a) *Ruvee Bhudr v. Rupshunkur Shunkerjee et al*, 2 Borr. 730.

(b) See above, p. 693.

(c) 1 Bom. H. C. R. 43.

(d) So *Amritrao v. Abaji*, above p. 703. See however above, p. 694, note (d), and *Vīrasvāmi v. Ayyāsvāmi*, 1 M. H. C. R. 471.

(e) See above, pp. 694, 703.

(f) Where there has been a dishonest or wanton expenditure of the family funds by one member, "a prodigal is to receive his share after deducting the amount he has dissipated on other than the necessary *samskāras* of the family," Steele, L. C. p. 62.

It may be noted that between Hindūs the rule of *dāmdupat*, or limitation of interest to the amount of the principal, applies even in the case of a mortgage where no account of the rents and profits has to be taken. The rule has not been abrogated by Act XXVIII. of 1855 or by the Limitation Acts, *Ganpat Pandurang v. Adarji Dadabhai*, I. L. R. 3 Bom. at p. 333. See Steele, L. C. 265, 266. The rule of *dāmdupat* is not applicable except where the defendant is a Hindū, *Nanchand Hansrāj v. Bapusaheb Rustambhai*, I. L. R. 3 Bom. 131. It is sometimes ignorantly supposed that the regular judicature of the British Courts has increased the oppression of agriculturist debtors and small proprietors. The incorrectness of this opinion is shown by Steele, L. C. 269, 271; M, Elphinstone's Report on the Deccan, Bom. Jud. Sel. vol. IV. p. 143, 193; Grant's Rep. *ibid.* p. 241, 242; Brigg's Rep. *ibid.* 249; Chaplin's Rep. *ibid.* 260; Pottinger's Rep. *ibid.* 298, 326, 328, 337; Chaplin's Rep. *ibid.* 489, 495; Robertson's Rep. *ibid.* 589.

An immediate payment of his share of such debts cannot be claimed by any member from his co-parcener. (a) The common debts due by the family are to be distributed in the same proportion as the shares of the common property, (b) and the debts incurred in carrying on a joint business override the rights of the co-sharers in the property acquired by means of it (c); but the common property and the other members of a joint family are not answerable for a member's separate debt. (d) From a passage in the *Mayūkha*, I. c., para. 2, it might appear that the discharge of the family debts is a necessary preliminary condition to a partition. The passage of *Kātyāyana*, however, which is cited by *Nīlakaṇṭha*, is differently rendered by *Colebrooke*. (e) *Nārada*, as translated by *Jolly*, p. 15, directs the brothers only to pay according to the shares, if they separate, and *Jimūtavāhana* (f) says of another passage

(a) *Lakshman Dada Naik v. Ramchandra Dada Naik*, I. L. R. 1 Bom. 561.

(b) *May*. Chap. IV. Sec. 6; *Stokes*, H. L. B. 72. When one of several co-sharers in an estate pays the whole revenue, his suit to recover contribution from the other co-sharers not resting on contract cannot be brought in the Small Cause Court. *Nolim Krishna Chakravarti v. Ram Kumar Chakravarti*, I. L. R. 7 Calc. 605. See Act IX. of 1872, Sec. 69; *Ram Tulul Singh v. Biseswar Lall Sahoo*, L. R. 2 I. A. 131, 143; *Gadgeppa Desai v. Apaji Jivanrao*, I. L. R. 3 Bom. 237; for the circumstances under which contribution can and cannot be recovered.

(c) *Johurra Bibee v. Shreegopal Misser*, I. L. R. 1 Calc. 470.

(d) *Narsinghbhat v. Chenapa bin Ningapa*, S. A. No. 205 of 1877; Bom. H. C. P. J. F. for 1877, p. 329; and above Bk. I. Chap. VI. Sec. 3 (b), Q. 2, p. 586; 2 Str. H. L. 335; *Mahableshvar v. Sheshgiri*, Bom. H. C. P. J. 1881, p. 183. A vatandar's mortgage of his vatan property is not valid against his heirs either under Reg. XVI. of 1827 or under Bom. Act III. of 1874, *Kūlu Narayan v. Hanmāpā*, I. L. R. 5 Bom. 435.

(e) *Dig.* Bk. V. T. 369.

(f) See *Coleb.* *Dig.* Bk. V. Chap. II. T. 111; *Smṛiti Chandrikā*, Chap. II. Sec. 2, para. 20.

of Nârada, Pt. II., Chap. XIII., sl. 32, that it is intended to inculcate the obligation of paying the father's debts, (as that which says "when sisters are married" merely prescribes the duty,) not to regulate the time of partition. The Smṛiti Chandrikâ, Chap. II. Sec. 2, p. 23, says, that if there are assets, the debts should be paid before partition. But Yâjñavalkya (quoted para. 18) prescribes merely that the debts and the assets shall be equally distributed. In other passages (a) a distribution of the debts amongst the coparceners is recognised, and the Dâyakrama-Sangraha, Chap. VII., para. 28, (b) expressly declares that the debts may be discharged subsequently to partition.

If a distribution of the debts is made, the coparceners severally, who desire to secure themselves against further claims on the part of the creditors, should obtain the assent of the latter to that arrangement. (c) Without this the

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(a) May. Chap. IV. Sec. 4, para. 17; Stokes, H. L. B. 52; Mit. Chap. I. Sec. 3, para. 1, *ibid.* 381; Coleb. Dig. Bk. I. Chap. V. Text 149, 185; Bk. V. Chap. III. Text 111, and Jagannâtha's Comm. Chap. VI. Text 375.

(b) Stokes, H. L. B. 516.

(c) See 1 Str. H. L. 191, and the authorities quoted there; and the case of *Bholanath Sirkar v. Baharam Khan et al*, 10 C. W. R. 392 C. R. The sons of deceased members are answerable after partition only for their proper shares of a father's debt, according to Coleb. Dig. Bk. I. T. 182-5. See Nârada, Chap. I. Sec. III. para. 2, Tr. p. 15; Vishnu, Tr. p. 45. The Sarasvati Vilâsa, Sec. 96 ff, understands this as relating to a separate paternal debt distinguished from a family debt binding all, but in *Doorga Persad v. Kesho Persad*, I. L. R. 8 Calc. 656 S. C., L. R. 9 I. A. 27, the Judicial Committee say of sons of a member of a joint family (according to the statement at the beginning of the judgment: "But it appears to their Lordships that the plaintiffs were not liable for the whole debt for which their father and other joint members of the family were originally liable, the debt having been apportioned amongst the several members of the family who had separated and several bonds given for the several portions of the debt. It appears therefore to their Lordships that the High Court was right, and that the infants were not bound to pay the whole of

assets may be followed in their hands, (a) though a separated son, it is said, is not answerable during the father's life for any debt contracted by his father. (b) In *Mahada v. Narain Mahadeo*, (c) the Bombay Sudder Court ruled that

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the debt for which the father was at one period jointly liable with the other members of the family, and that they were liable only for the father's portion of the debt." This they were ordered to pay, though their ostensible guardian was not the legal guardian and had no right to defend the suit in their name. If several bonds for the several shares of the debts had been accepted by the creditors in discharge of the original joint debts, there could of course be no claim except upon the several obligors. But the Hindu Law seems apart from that to impose only a several obligation on the co-sharers except in virtue of any of them possessing himself of the whole estate or more than his share of it. See above, pp. 80, 610.

In an opinion given at 2 Str. H. L. 283, Colebrooke says that the distribution of the debts in a partition is to be regarded merely as an adjustment amongst the parceners not affecting a creditor's right against all or any of them. The caste rules, as at Borradaile's Collection, Lith. 41, seem merely to contemplate a partition of the debts, but so far as property subject to a charge had been taken the taker would probably be liable for the common debt. See Steele, L. C. 59, 219, 409.

(a) See Coleb. Dig. Bk. I. Chap. V. T. 167, note; T. 169, and Jagannātha's Comm.; Coleb. in 2 Str. H. L. 283.

(b) Coleb. Dig. *loc. cit.* and *Amrut Row Trimluck v. Trimluck Row Amrutayshwur*, Bom. Sel. Ca. 249. See 2 Str. H. L. 277. And that a minor cannot be called on during his minority, *ibid.* 279. In *Bagmal et al v. Sadashiw et al*, S. A. No. 70 of 1864, Arnould and Tucker, JJ., held that separated sons are liable after the father's death for debts incurred by him before the partition. As to the personal liability for a father's debts see above, p. 80; and below, Bk. II. Chap. I. Sec. 1, Q. 5. As to the liability of the property, see *Jamiyatram v. Purbhudis*, 9 Bom. H. C. R. 116, referred to in the Introduction to Bk. I. p. 77; and also pp. 169, 642. In *Harreedass v. Ghirdurdass*, S. D. A. Sel. Ca. 46, on attachment of a parcener's share it was made liable for its proportion of the funeral expenses of the parcener's mother. See Smṛiti Chandrikā, Chap. XIII. paras. 12, 13.

(c) 3 Morris, 346.

the whole of the family property remains liable for a debt (properly) contracted by any member, although another may have obtained a decree for a partition. (a) For the separate debt of a single coparcener, the common property is not liable, but the creditor may, as we have seen, make the share available by enforcing a partition. (b) In the common case of a mortgage acquiesced in by the co-sharer seeking a partition he is liable generally in proportion to his share in the mortgaged property to the charges upon it. (c) This does not enable him to redeem his own share alone, the obligation being indivisible, but he may redeem the whole, (d) and as a condition of giving up their proper shares to the co-owners he may require payment to him of such sums by way of contribution as shall be found due according to the nature of the original transaction and on a general adjustment of the accounts amongst the co-sharers. (e) While the mortgagee is thus secured against any "fragmentation" of his security he must serve all co-sharers with notice of intended foreclosure under the Bengal Law, (f) and if he obtains a decree on the mortgage debt and executes it by sale against the mortgaged property must sell both his own and the mortgagor's interest therein. And even though the mortgagor's interest only is specified as the object of sale yet the mortgagee who has promoted the sale is bound by an estoppel against afterwards setting up his own right. (g)

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(a) See *Nārada*, Pt. I. Chap. III. sl. 16.

(b) See *supra*, § 6 B; also pages 163, 263, 576, 578.

(c) *Bhyrub Chunder Mudduck v. Nuddiarchand Paul*, 12 C. W. R. 291; *Laljee Sahoy v. Fakeerchand*, I. L. R. 6 Calc. 135.

(d) The practice has sometimes been otherwise, see *Musst. Phool-bash Koonwar v. Lalla Jogeshwar Sahoy*, L. R. 3 I. A. at p. 26. See *Norender Narain's* case, below.

(e) *Rama Gopal v. Pilo*, Bom. H. C. P. J. F. 1881, p. 161.

(f) *Norender Narain Singh v. Dwarka Lal Mundun*, L. R. 5 I. A. at p. 27.

(g) See *Hari v. Lakshman*, I. L. R. 5. Bom. 614, quoting *Syed Imam Montazooddeen Mahomed v. Rajkumar Ghose*, 14 Beng. L. R. 408

In *Sabaji Savant v. Vithsavant* (a) a one-sixth share was awarded to two brothers by a decree for partition. They were dispossessed under a decree obtained by the mortgagee of an undivided one-sixth from the common ancestor. (b) It was held that they could not obtain a fresh partition in execution of their former decree, though it was suggested they might have a remedy against their former coparceners by an independent suit.

§ 7 B. 2. Other liabilities, that is provisions for the maintenance or portions of persons not entitled to shares, as described above, Section 6 B, (c) may be distributed by agreement amongst the co-sharers. But the estate at large is liable, at least in the hands of the members of the family making a partition, (d) and coparceners, who desire to limit their responsibility, must obtain the assent of the persons interested. At Calcutta it has been held (e) that the purchaser of part of an estate, subject to a charge, may be sued singly for the whole amount due, and the same principle would probably be applied in the case of a purchaser with notice of the lien or liability to a charge of the kind we are

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F. B.; *Narsidás Jitram v. Joglekar*, I. L. R. 4 Bom. 57; Ind. Evid. Act, Sec. 115; *Chooramun Singh v. Shaik Mahomed Ali*, L. R. 9 I. A. 21, 25.

(a) Bom. H. C. P. J. F. 1881, p. 193.

(b) *Rámchandra Dikshit v. Sávitribái*, 4 Bom. H. C. R. 73 A. C. J. and per Lord Hardwicke in *Penn v. Lord Baltimore*, 2 W. & T., L. C. 844.

(c) See also pp. 77, 163, 164, 235, 776, 780; Bk. II Chap. II. Sec. 1, Q. 9; *Narhar Singh v. Dugnath Kuer*, I. L. R. 2 All. 407; above, pp. 251, 252.

(d) *Ramachandra Dikshit v. Savitribai*, 4 Bom. H. C. R. 73 A. C. J., referred to above; *Adhiranee Narain v. Shona Malee et al*, I. L. R. 1 Cal. 365; *Nārada*, Part II. Chap. XIII. paras. 25-29; *Manu* V. 148.

(e) *Prosonno Coomar Sein v. The Rev. B. F. X. Barboza*, 6 C. W. R. 253 C. R.

now considering. (a) Lastly, if contrary to the knowledge and expectation of the co-parceners who made the partition, an absent co-parcener supposed to be dead should come forward to claim his share, or the widow of one deceased should give birth to a son, the proper share of this additional parcener must be made by proportionate deductions from the shares distributed. (b) The coparceners in existence however or begotten at the time of a partition, and those only, are entitled to shares. After-born members of the family share only with their father or those united with him. (c)

A son who has for money relinquished his share to his father stands thenceforth in the position of a separated son. (d) But as a separated son he succeeds in preference to the widow, though the father can dispose of the estate. (e)

After a partition has been made a son born to a coparcener (including a father in relation to sons separated from him in such partition) succeeds to the share and to the acquisitions of the separated coparcener to the exclusion of

(a) *S. Bhagabati Dasi v. Kanailal Mitter et al*, 8 B. L. R. 225; *B. Goluck Chunder Bose v. B. Ohilla Dayee*, 25 C. W. R. 100 C. R.

(b) Mit. Chap. I. Sec. 6, paras. 1, 8; Stokes, H. L. B. 393-5; May. Chap. IV. Sec. 4, para. 35; Stokes, H. L. B. 56; Coleb. Dig. Bk. V. Chap. VII. Sec. 2, T. 394.

(c) *Yekeyamian v. Agniswarian et al*, 4. M. H. C. R. 307; Mit. Chap. I. Sec. 6, pl. 4; Stokes, H. L. B. 394.

(d) Steele, L. C. 56, 58, 61.

(e) See *Balkrishna Trimbak v. Savitribai*, I. L. R. 3 Bom. 54. The descendant who has taken a part of the property in discharge of his claims and left the family, (Steele, L. C. 213), has thus forfeited his rights as a co-sharer in any further partition, but not as heir on failure of the members who remained united and their representative descendants. These rights are reciprocal. (Steele, L. C. 233, 422.) Amongst some castes this heirship of the brethren excludes the daughter except as to gifts from her father (Steele, L. C. 425) and even the widow (*ib.* 424, 423,) though in fewer cases.

his former co-sharers. (a) He stands on the same footing towards the paternal estate as a son who remained united with his father when a separation occurred between the latter and his other coparceners. (b) This does not, however, prevent a gift of a moderate amount to a separated son (c) as to one unseparated.

Partition does not finally close all claims of the father and sons on each other (d) or deprive a separated son of his right of inheritance in competition with another heir, as for instance a reunited coparcener not a son. (e) In case of absolute indigence, their claims on each other revive. (f) So too the claim of a mother or a wife to support is not extinguished by the allotment to her of a share. (g)

A suit on an alleged partition which the plaintiff fails to establish does not bar a subsequent suit by him as a coparcener for partition of the property set forth as undivided. (h)

(a) Gaut. Ad. 28, para. 26; Nārada, Pt. II. Chap. XIII. para. 44; Steele, L. C. 59, 406; Note (c) above, p. 792.

(b) See Mit. Chap. I. Sec. 6, para. 2; Vyav. May. Chap. IV. Sec. 4, paras. 33, 34.

(c) Mit. Chap. I. Sec. 6, paras. 13, 14, 15. See *Lakshman Dada Naik v. Ramchandra Dada Naik*, I. L. R. 1 Bom. 561, 567, S. C., L. R. 7 I. A. 181. Not by will against an unseparated son, *ib.*

(d) Vīram. Tr. p. 54, 218. See 2 Macn. 114, 148; Hīrāta, quoted in Coleb. Dig. Bk. V. T. 23.

(e) Vīram. Tr. p. 218; *Ramappa Naiken v. Sithammāl*, I. L. R. 2 Mad. 182.

(f) Steele, L. C. 40, 178, 179; Smṛiti Chandrika, Chap. II. Sec. 1, para. 31 ss; *Himatsing v. Ganpatsing*, 12 Bom. H. C. R. 94; *Ramchandra v. Sakharām Vagh*, I. L. R. 2 Bom. 346; *Savitribai v. Lazmibai*, I. L. R. 2 Bom. at p. 590. See *Sree Cheytania Anunga Deo v. Pursuram Deo*, Morl. Dig. p. 442, No. 38. So also a guru and a chela are bound to support each other in distress; Steele, L. C. 442.

(g) Coleb. Dig. Bk. V. T. 88, Comm. See 1 Str. H. L. 67, 175; Smṛiti Chandrikā, Chap. II. Sec. 1, para. 3 ss. Steele, L. C. 40, states the duty generally.

(h) *Konerrav v. Gururav*, I. L. R. 5 Bom. 589.



The execution of a decree for partition of an estate subject to payment of land revenue is to be made by the Collector. (a)

Repugnant conditions cannot be annexed to the separate estates taken under a partition. (b)

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(a) Act X. of 1877, Sec. 265. Rules for the performance of the duty are provided by Bombay Act V. of 1879, Sec. 113.

Joint owners have, under English law, equal rights to custody of title deeds. On a partition they are usually assigned to the sole owner or the owner of the largest share of the portions to which they severally relate, but with a right in all interested to see and have copies of them. See *Lambert v. Rogers*, 1 Meriv. 489; *Jones v. Robinson*, 3 DeG. M. & G. 910. Hindu custom assigns the custody to the head of the family with liberty of inspection to all interested. *Steele*, L. C. 220.

(b) *K. Venkatramanna v. K. Bramanna Sastralu*, 4 Mad. H. C. R. 345.

## BOOK II.

### PARTITION.

#### CHAPTER I.

#### BETWEEN THE HEAD OF A FAMILY AND HIS FIRST THREE DESCENDANTS.

##### SECTION 1.—OF ANCESTRAL PROPERTY.

**Q. 1.**—Can a son claim a share of the ancestral and undivided property from his father ?

**A.**—A son has no right to demand a share of the ancestral and undivided property from his father against his wish, unless there are good reasons for the demand. These reasons may be stated thus :—(1) The father has relinquished his claim to his property. (2) He is dissipating his property. (3) He is in an unsound state of mind. (4) He is very old. (5) He is afflicted with an incurable disease. In all these cases a son can claim a share of the ancestral property from his father, though he may be unwilling to give it.—*Surat, January 3rd, 1859.*

**AUTHORITIES.**—(1) *Vyav. May. Dāyabhāga*, p. 91, l. 7; (2\*) *Mit. Vyav. f. 50, p. 1, l. 7* :—

“For the ownership of father and son is the same in land, which was acquired by the grandfather, or in a corrody, or in chattels” (which belonged to him). (*Mit. Chap. I. Sec. 5, para. 3; Stokes, H. L. B. 391.*)

**REMARKS.**—1. The passage quoted by the Śāstri, as well as the rules derived therefrom, refers to the self-acquired property of the father. Regarding the fourth ground for which the son is said to be able to demand division—old age—it ought to be remarked that

it holds good only if the father is unable to manage his affairs on account of old age. (a)

2. According to the *Mitākṣharā*, l. c. and *ibid.* paras. 5 and 8, the son has a right to demand a division of ancestral property. *Nilakanṭha* states the same. (May. Chap. IV. Sec. 4, para. 13; Stokes, H. L. B. 51). See also *Duyashunker v. Brijvullabh.* (b)

Q. 2.—A man has a right to one-third of the property left by his deceased father. The man has two sons. The question is, how the man's share should be divided among the grandsons?

A.—The sons and the grandsons of the deceased have equal right to the share of the grandfather's property, but as the father of the two grandsons is alive and is in a good state of health, the share cannot be divided unless the father has no objection thereto. The *Śāstra* assigns many conditions to the subdivision of such share, and it is, therefore, impossible to say what shall be the share of each grandson in the share of the son.—*Surat, March, 18th 1858.* (c)

AUTHORITY.—\* *Mit. Vyav. f. 50, p. 1, l. 7* (see the preceding Question).

REMARKS.—1. The sons can enforce the partition of the ancestral property, and it must be divided equally between the father and his sons if the father holds a separated share. If he is united with his brethren his intervening will may defeat the sons' desire or partition unless they can make out a case of unfair dealing. (d)

2. The *Śāstri* thinks of the partition of property acquired by the father himself, or of the grandfather's property during his life and that of the father.

Q. 3.—Can the sons of a man divide the ancestral property among themselves without his consent?

(a) See *Steele*, L. C. 216.

(b) *Bom Sel. Ca.* pp. 44, 45. See above, pp. 659 ss.

(c) Similar answers were received from *Ahmednuggur, February 21st, 1851*; *Broach, May 22nd, 1857.*

(d) See above, pp. 604, 657.

**A.**—A man's sons have a right to the ancestral property, but if such property, after having passed from the family, was regained by the father, it must be considered as his acquisition. This, as well as that property which may have been directly acquired by the father, cannot be divided without his consent.—*Tanna, March 2nd, 1854. (a)*

**AUTHORITIES.**—(1) Mit. Vyav. f. 50, p. 1, l. 7 (*see* Q. 1 of this Sec.); (2) f. 47, p. 1, l. 7; (3) Vyav. May. p. 91, l. 2; (4) p. 91, l. 4.

**REMARKS.**—1. The sons have a right to demand from their father a division of the ancestral property, and can force him by law to make it. But they cannot divide it privately amongst themselves without reference to their father.

2. As to the meaning of "recovered," when applied to a family estate, *see Bissessur Chuckerbutty et al v. Seetul Chunder Chuckerbutty, (b)* and *Intro. § 5 A. 2 b, p. 718.*

3. Prof. H. H. Wilson observes on this subject, in Vol. V. of his works, at p. 68 :—"They leave no doubt that a man has neither temporally nor spiritually an absolute command over the whole of any description of his property : he may certainly make away with a great part of it, but there is a limit. That limit is an adequate provision for his family, and we can conceive no more difficulty as to the determination of this provision by the Court, than there is in the ascertainment of the sum a widow is entitled to for her maintenance. In the above texts also is to be understood the existence of no distinction between self-acquired and inherited property, and they all apply to a man's wealth generally, making it imperative upon him to secure provision for his family before he alienates even self-acquired wealth. With this reservation, he may dispose of property he has gained during his own life-time as he pleases, as according to Kātyāyana 'except his whole estate and his dwelling house, what remains after the food and clothing of his family a man may give away.' (c) Food and clothing are, however, not to be understood in their literal acceptation only, but imply maintenance, as appears from other texts. With regard also to moveable ancestral property, there is authority for considering that to be at the father's

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(a) Similar answers were received from *Surat, May 27th, 1847; Ahmednuggur, July 18th, 1850; Poona, October 18th, 1854; Dharwar, October 25th, 1858.*

(b) 9 C. W. R. 69 C. R.

(c) Vyav. May. Chap. IX. p. 4; Stokes, H. L. B. 134.

disposal, according to the text of Yājñavalkya : 'of precious stones, pearls and corals, the father is master of the whole, but of the whole immoveable property neither father nor grandfather is master.' (a) The text of Vishṇu, however, goes further and declares that 'the father and son have equal ownership in the whole of the grandfather's wealth.' As however the control over moveable property, consisting at least of money or jewels, is a nullity, the distinction may be admitted, and the power, if not the right, of a father to dispose of such property at his pleasure is in general undisputed; at the same time it may be safely said that the alienation of this property, like that of self-acquired wealth, is only allowable after provision made for the family, and that the unequal partition of both amongst sons, which is authorized by special considerations, may be set aside, if the least favoured son can establish undeniably that he has been deprived of a due share of his father's wealth by that father's unjust anger towards himself, or undue partiality for another son." (b)

Q. 4.—A Yogi had four sons. Two of these, one a minor and another of full age, lived with their father. The other two, who had a quarrel with their father, divided the house, which was the ancestral property of the family, against the will of their father and in his absence. Can the two sons divide the property, or must such a division be cancelled?

A.—The division must be cancelled.

*Khandesh, October 11th, 1852.*

AUTHORITY.—Vyav May. p. 90, l. 2.

REMARKS.—1. The Śāstri's answer is right, because the division had been made, as it would seem, without due regard to the equal rights of the other brothers. But it must be understood, that, though this division must be cancelled, the sons may according to the Śāstras force their father to make a division of his ancestral property.

(a) Quoted from the Mitāksharā in the Vyavahāra Mayūkha, Chap. IV. Sec. 1, p. 5; Stokes, H. L. B. 43; Dāyakrama-Sangraha, Chap. VI. p. 19 f; Stokes, H. L. B. 511; and Dāyabhāga, p. 56 (Chap. II. Sec. 22; Stokes, H. L. B. 204).

(b) Comp. Steele, L. C. 213, 408; Coleb. Dig. Bk. V. T. 74, 75, 77, 78; and see above, pp. 209, 637, 641, 645.

2. The authority quoted by the Śāstri, which declares that "brothers shall divide the estate after their father's death" (a) refers to self-acquired property, and is, therefore, out of place.

Q 5.—A man has instituted a suit against his father for a moiety of the ancestral property as his share. The father has answered that he has contracted some debts on account of the maintenance of the family, and that his son cannot claim a share of the property until the debts have been paid. The question, therefore, is, whether a son can claim a share of the property without paying the debts?

A.—The obligation of liquidating the debts rests on the father. His son is not at all responsible for them as long as the father is alive. The father and the son have an equal share in the ancestral property of the family. The son, therefore, can claim a moiety of the property without being obliged to pay the debts.—*Surat, July 6th, 1860.*

AUTHORITIES.—(1) Mit. Vyav. f. 19, p. 2, l. 8; (2) f. 50, p. 1, l. 7, (*see* Chap. I. Sec. 1, Q. 1); (3) f. 46, p. 2, l. 11:—

"Even a single individual may conclude a donation, mortgage, or sale of immoveable property, during a season of distress, for the sake of the family, and especially for a pious purpose."

"The meaning of that is this:—While the sons and grandsons are minors and incapable of giving their consent to a gift and the like, or while brothers are so and continue unseparated, even one person, who is capable, may conclude a gift, hypothecation, or sale of immoveable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable." Mit. Chap. I. Sec. 1, paras. 28, 29; Stokes, H. L. B. 376.) (b)

REMARKS.—1. "In respect of the grandfather's estate the sons are not dependent on the father, as they are in respect of the father's self-acquired property. Consequently the partition of the grand-

(a) Borradaile, May. Chap. IV. Sec. 4, para. 1; Stokes, H. L. B. 47.

(b) *See* Nārada, Pt. I. Chap. III. paras. 2, 3, 4, &c. above, and Introd. to Bk. II. pp. 609, 617, 641, 644.

father's estate may be made even against the father's will, and the rule regarding the father's two shares does not obtain." (a)

2. Though the Smritis do not provide for a son's paying the family debts while the father is alive and capable, that is because they contemplate the father as the sole manager. (b) The passage cited shows that the Śāstri's view was too narrow, for if an ordinary member may encumber the estate for the needs of the family, (c) much more may the father; yet his power of dealing with it would be crippled if a son could at any moment claim his share free from its proportional burden. The customary law imposes on sons an obligation to pay all debts reasonably incurred in the administration of the affairs of the family, (d) as on the father of paying those necessarily incurred by sons living with him unless he has expressly warned the creditor against lending to them. (e)

3. The rights of a decree-holder for the father's debts were preferred to those of a decree-holder for the debts of the owner himself. (f) This would probably not be admitted in Bombay unless the property had been attached before the father's death in execution of the decree against him. See above, pp. 77, 161, 193. (g)

Q. 6.—A person had six sons, the eldest of whom is dead, the son of the deceased sues his grandfather for a share of the family property. Is the claim admissible?

A.—The grandson cannot claim any share of the property which his grandfather may have himself acquired. He may, however, claim a share of that which may have descended from his ancestors.—*Dharwar*, 1846. (h)

(a) *Viram*. Tr. p. 66. "The father may reserve to himself one extra share of all property acquired by his own exertions, and as respects that property he may even deprive his son of succession to it; but the son has an indefeasible right to inherit descended property." Steele, L. C. p. 58.

(b) See above, pp. 644, 646; Steele, L. C. 405.

(c) Above, p. 632; Steele, L. C. 54, 398.

(d) Steele, L. C. 40, 217. Above, p. 164.

(e) Steele, L. C. 178.

(f) *Gunga Narain v. Umesh Chunder Bose et al*, C. W. R. for 1864, p. 277.

(g) For the Madras law, see above, pp. 162, 628.

(h) A similar answer was received from *Surat*, September 19th, 1864.

**AUTHORITY.**—\* Mit. Vyav. f. 50, p. 1, l. 7 (*see* Chap. I. Sec. 1, Q. 1).

**REMARKS.**—1. The authority quoted refers only to the case of a father and a son.

2. The question, whether a grandson can force his grandfather to make a division of the property which he inherited from his ancestors, has not been touched directly in the Hindû Law-books. Still the correctness of the Śâstri's opinion may be shown by the following considerations:— The position of a son's son towards his grandfather, and his rights to the ancestral property, are exactly the same as those of a son failing the latter. Both have by and from their birth an ownership in the family property—a right which is indefeasible and unobstructible. (a) Moreover, on the death of his father, the grandson takes his place in regard to religious ceremonies and represents him; it is only consistent therefore that the grandson's right to demand a division of his grandfather's ancestral property should be the same as that of his father. (b)

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**Q. 7.**—A man has two sons. He equally divided his property between them. He gave one share to his eldest son and the other to his grandson, because his younger son was abroad. The question for consideration in the case is, whether a father can, without the consent of his son, give his share to his grandson?

**A.**—The father could not give his son's share to his grandson, unless his son is incompetent to receive it.

*Ahmednuggur, September 12th, 1855.*

**AUTHORITIES.**—(1) Mit. Vyav. f. 47, p. 1, l. 7; (2) f. 60, p. 1, l. 13; (3) f. 60, p. 2, l. 8; (4) f. 46, p. 2, l. 14; (5) f. 50, p. 1, l. 7; (6) f. 12, p. 1, l. 16; (7) Vyav. May. p. 161, l. 8; (8) p. 94, l. 1; (9) p. 94, l. 3; (10\*) Vîramit. f. 181, p. 2, l. 16:—

“Now both that partition which is made at the desire of sons during the lifetime (of their father), and that which is made after

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(a) *See* Mit. Chap. I. Sec. 1, para. 3; Stokes, H. L. B. 365; and Bk. I. p. 67, 74; Steele, L. C. 58, 63, 40; Coleb. Dig. Bk. V. Chap. II. *ad inî*.

(b) *See also* Introd. to Bk. II. p. 658; and *Nâgalinga Mudali v. Subbîramaniya Mudali et al*, 1 M. H. C. R. 77.



the father's death, are made even at the desire of one (co-parcener). Therefore, that also, which has been stated by Kātyāyana, in his chapter on Partition, 'They shall deposit the wealth of minors and absentees, preserving it from expense, with (their) relations and friends,' can take effect. For, if a partition could not take place without the permission of such (minors or absentees), the statement that their wealth shall be deposited with relations or friends would be improper."

REMARK.—According to the above passage it would appear that an absent son must not be simply passed over in favour of his son. But there would be no objection to deposit his share with the latter, in case the son's son is of age and fit to take care of it. See also *Intro. to Bk. II. p. 676.*

Q. 8.—A man gave a portion of the property belonging to his father to his son who had separated from him. It remained in the possession of his son for ten years. The son afterwards sold it. By this time his half brothers born after the giving of the property, filed a suit and asserted that they had a right to a portion of the property given by their deceased father. The question is, whether or not sons, born after their father had given away his property, can claim a portion of it, even when it has been sold to another.

A.—When a father and his sons have divided their property and become separate, sons born after the partition can have no claim to the property which passed into the hands of their brothers. They cannot, therefore, sue those who have received a share of the property, nor those to whom it has been sold.—*Tanna, July 12th, 1851.*

AUTHORITY.—Mit. Vyav. f. 50, p. 2, l. 7:—

"A son born before partition has no claim on the wealth of his parents, nor one, begotten after it, on that of his brother." (Mit. Chap. I. Sec. 6, para. 4; Stokes, H. L. B. 394.)

REMARKS.—1. Sons born after partition have, however, an exclusive right to their father's share, and to any property which he may have acquired after partition. (a)

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(a) See above, pp. 68, 792.

2. In the case of *Bace Gunga v. Dhurumdass Nurseedas*, (a) the interest of a son still unborn was admitted as against a dissipation of property by the father; but in the case of *Buraik Chuttur Singh et al v. Greedharee Singh et al*, (b) it was held that a grandson unborn at the time cannot afterwards question an alienation of ancestral property made by his grandfather with his father's assent. It is only on the actual birth of the son that his co-ownership arises; it is not retrospective, as adoption to some extent is when made by a widow. Perhaps this principle may be applied to explain the case of *Giridhari v. Kanto*, (c) the debts there having apparently been contracted before the birth of a son. (d) A son cannot contest an alienation made by his father before he was begotten, (e) or adopted. (f)

## SECTION 2.—OF SELF-ACQUIRED PROPERTY.

Q. 1.—Can a man and his son divide their property between them?

A.—The property left by the grandfather may be equally shared by the son as well as his father. The property acquired by the father should be divided into three shares, two of which should be allotted to the acquirer and one to his son.—*Sholapoor, January 29th, 1855.*

AUTHORITIES.—(1) *Viram*. f. 105, p. 2, l. 3; (2) *Vyav.* May. p. 183, l. 6; (3) p. 174, l. 3; (4) p. 180, l. 3; (5) p. 180, l. 4; (6\*) *Mit. Vyav.* f. 50, p. 1, l. 7 (*see* Chap. I. Sec. 1, Q. 1); (7\*) f. 50, p. 1, l. 11:—

“So does that which ordains a double share (relate to property acquired by the father himself). ‘Let the father making partition reserve two shares for himself.’” (*Mit. Chap. I. Sec. 5, para. 7; Stokes, H. L. B. 392*). But *see* also paras. 9, 10; *Stokes, H. L. B. 393; Colebrooke, Dig. Bk. V. Sec. 96; Nārada, Pt. II. Chap. XIII. sl. 12.*

Q. 2.—A man has four or five sons, and it is probable that he may have more. For some reason known only to

(a) *Bom. S. A. R.* for 1840, p. 16.

(b) 9 *C. W. R.* 337.

(c) *L. R.* 1 I. A. 320.

(d) *See* Chap. I. Sec. 2, Q. 8.

(e) *Jado Singh v. Musst. Rane*, 5 *N. W. P. R.* 113.

(f) *Rambhat v. Lakshman Chintaman*, 1 *L. R.* 5 *Bom.* 630.

the man, he framed a memorandum, showing what each of his sons was to receive on account of his share. Can this memorandum be taken advantage of by the sons in claiming a share during the lifetime of the father?

A.—A father may give shares to his sons if he chooses, but sons have no right to demand shares of any property acquired by their father while he is alive. The memorandum does not seem to be authoritative, and cannot be taken advantage of by the sons.—*Dharwar, January 11th, 1850.*

AUTHORITY.—Mit. Vyav. f. 47, p. 1, l. 12 :—

“One period of partition is, when the father desires separation as expressed in the text [para. 1], ‘When the father makes a partition.’ Another period is while the father lives, but is indifferent to wealth, and disinclined to pleasure, and the mother is incapable of bearing more sons; at which time a partition is admissible, at the option of the sons, against the father’s wish; as is shown by Nārada, who premises partition subsequent to the demise of both parents, ‘Let sons regularly divide the wealth when the father is dead,’ and adds, ‘or when the mother is past child-bearing, and the sisters are married, or when the father’s sensual passions are extinguished.’ Here the words ‘Let sons regularly divide the wealth’ are understood. Gautama likewise having said ‘after the demise of the father, let sons share his estates,’ states a second period, ‘Or when the mother is past child-bearing;’ and a third, ‘While the father lives, if he desire separation.’ So, while the mother is capable of bearing more issue, a partition is admissible by the choice of the sons, though the father be unwilling, if he be addicted to vice or afflicted with a lasting disease. That Śankha declares, ‘Partition of inheritance takes place without the father’s wish, if he be old, disturbed in intellect, or diseased.’” Mit. Chap. I. Sec. 2, para. 7; Stokes, H. L. B. 378.

REMARK.—See Book II. Introd. p. 666 ss; 1 Str. H. L. 193. The Mit. Chap. I. Sec. 5, para. 8, (a) assigns to the sons power to demand a partition of ancestral property at any time, while para. 10 gives to the father full power as against control by the sons, of dealing with property acquired by himself. At Madras it has been said, in *Nāgalinga Mudali v. Subbiramaniya Mudali et al*, (b) that paras. 8 and 11 of Sec. 5 relate to a partition of ancestral property, while Sec. 2 relates to

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(a) Stokes, H. L. B. 393.

(b) 1 M. H. C. R. 77.

property acquired by the father himself. The Mit. Chap. I. Sec. 2 (see Q. 4) recognises unequal partition of self-acquired property by the father as still consistent with the Hindû Law, limited however so as not to allow more than a deduction of one-twentieth, one-fortieth, and one-eightieth for the first, second, and third sons respectively. (a) It applies the prohibition against any unequal division only to a partition by sons amongst themselves. See Q. 3, 4 below. Thus the power of disposition, generally affirmed in paragraph 10 of Sec. 5, and extended by the High Court of the N. W. P. to ancestral property, (b) does not imply that of a capriciously unequal distribution, that case being expressly provided against in Sec. 2, para. 13. (c) The passage in Sec. 5, para. 10, is further qualified by Sec. 1, para. 27, (d) followed in *Muttumaran v. Lakshmi*. (e)

The Vyav. May. Chap. IV. Sec. 6, para. 2, (f) extends the prohibition against inequality to a partition by a father. The *Vīramitrodaya*, cited *infra*, follows the *Mitāksharā*. Nārada allows the father to give the eldest the best share or to distribute according to his inclination, Nārada, Pt. II. Chap. 13, para. 4. This passage points to the special deductions, as Pt. I. Chap. III. paras. 36, 40, to the father's complete authority. The Mit. Chap. I. Sec. 5, pl. 7, (g) limits similar passages to the self-acquired property, and the father's independence as to such property in a partition

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(a) So Smṛiti Chandrikā, Chap. II. Sec. I. paras. 3, 8, 22; Chap. VIII. para. 25; Mādhaviya, paras. 5, 9; Varadrāja, pp. 5, 8. These deductions had reference very probably as originally instituted to the rank of the wives married in succession from amongst the different classes. Such a ground of difference in the rank of the sons is found in various parts of the world, as *ex. gr.* amongst the Swāthis in the Himālayas.

In Kangra it appears that the eldest son still takes either one-twentieth or else some particular field or chattel as an addition to his aliquot share in an inheritance. In return he has to pay a proportionally extra share of the paternal debts should there be any. Panj. Cust. Law, Vol. II. pp. 182-3, 225.

(b) *Baldeo Das v. Sham Lal*, I. L. R. 1 All. at pp. 78, 79.

(c) Stokes, H. L. B. 380.

(d) *Ibid.* 375.

(e) M. S. R. for 1860, p. 227.

(f) Stokes, H. L. B. 72.

(g) Stokes, H. L. B. 392.

seems to mean independence only of the sons, not freedom to depart from the rules prescribed by the Śāstras. (a)

In *Bahirji Tanaji v. Oodatsing et al*, (b) the High Court of Bombay ruled that a grantee of an Inām village from the Rājāh of Satara might by will settle it on his two junior wives and their children to the exclusion of his eldest son. See the Remarks under Questions 4 and 5, and the Introduction to Book II. § 7, on the RIGHTS AND DUTIES ARISING ON PARTITION.

Q. 3.—A man has a son by each of his two wives. Should any larger share be given to the son of the elder wife?

A.—No.—*Dharwar*, 1846.

AUTHORITY.—\* Mit. Vyav. f. 48, p. 1, l. 8 :—

“It is expressly declared, ‘As the duty of an appointment (to raise up seed to another), and as the slaying of a cow for a victim, are disused, so is partition with deductions (in favour of elder brothers).’” (Mit. Chap. I. Sec. 3, para. 5; Stokes, H. L. B. 382).

REMARK.—The “partition with deductions” (uddhāra) includes the division between elder and younger sons, and between the sons of elder and younger wives. Regarding the latter, see Gautama, *Adhyāya* 28, paras. 11, 12, Transl. p. 300, 301.

Q. 4.—There are two uterine brothers whose father is alive. When they divided their property, one of them obtained a larger piece of ground. The other has sued him for it. The father wishes that the unequal division should remain as it is. Can the brother's claim to an equal division be allowed?

(a) Mit. Chap. I. Sec. 5, pl. 10 (Stokes, H. L. B. 393) compared with Sec. 2, pl. 1, 13, 14 (Stokes, H. L. B. 377, 380), and the *Smṛiti Chandrikā*, Chap. II. Sec. 1, pl. 14, 20, compared with Chap. VIII. pl. 19, 25, 26; *Vīram. Tr.* pp. 54, 63 ss.

According to the early Common Law in England the inheritance if held in socage had to pass according to custom either to the eldest or youngest son or in equal parts to all the sons, saving the preferential right of the eldest to the family abode, for which allowance was made to the others. *Glanv.* VII. 3.

(b) R. A. 47 of 1871; Bom. H. C. P. J. F. for 1872, No. 33.

4.—In the Kali age, unequal division is forbidden. One brother can therefore sue the other. The father has no right to maintain an unequal division.

*Ahmednuggur, July 30th, 1848.*

AUTHORITIES.—(1) Mit. Vyav. f. 47, p. 1, l. 7; (2) f. 48, p. 1, l. 8 (see the preceding question); (3) f. 52, p. 1, l. 13; (4) f. 50, p. 1, l. 7; (5) f. 47, p. 2, l. 7; (6) f. 51, p. 1, l. 3; (7\*) f. 47, p. 1, l. 11:—

“This unequal distribution supposes property by himself acquired. But if the wealth descended to him from his father, an unequal partition at his pleasure is not proper; for equal ownership will be declared.” (Mit. Chap. I. Sec. 2, para. 6; Stokes, H. L. B. 378.)

(8\*) Mit. Vyav. f. 48, p. 2, l. 10:—

“The distribution of greater and less shares has been shown (§ 1). To forbid in such case an unequal partition made in any other mode than that which renders the distribution uneven by means of ‘deductions,’ such as are directed by the law, the author adds:—‘A legal distribution, made by the father among sons separated with greater or less shares, is pronounced valid.’

“When the distribution of more or less among sons separated by an unequal partition is legal, or such as ordained by the law, then that division, made by the father, is completely made, and cannot afterwards be set aside: as is declared by Manu and the rest. Else it fails, though made by the father.”—(Mit. Chap. I. Sec. 2, paras. 13 and 14; Stokes, H. L. B. 380.)

REMARKS.—1. Under the law of the Mitāksharā the answer is correct, whether the land was ancestral (Auth. 7) or self-acquired property (Auth. 8 and 9). The inequality of distribution contemplated by the latter is strictly limited to the specified deductions that may be made in favour of the eldest son or the eldest wife’s son. See Q. 2, Remark. According to the principles laid down by the Courts an unequal division of self-acquired property by a father is perhaps admissible, but it is opposed to the Commentaries, (a) except as to a reasonable gift to a particular son. See above, pp. 206, 209, 211.

(a) “He may distribute his property, but he must do it according to law,” Ellis, at 2 Str. H. L. 418. The Smṛiti Chandrikā and Mādaviya, on examination by Coleb. yielded a similar result as to immovables, 2 Str. H. L. 439, 441. So according to the Benares and Mithila law, according to Sutherland, *ibid.* 445; and in Bombay, *ibid.* 449, and Madras, *ibid.* 450.

2. The principle adopted by the Smṛiti Chandrikā, of a complete ownership arising immediately on birth coupled with an exclusive power of administration in the father during his life is contested by Jīmūtavāhana and Raghunandana, who argue that the right arises only on the father's death. Mitramiśra refutes their contention, Viram. p. 7-15. At p. 45 he insists on the distinction between ownership and independence in disposal of property.

Q. 5.—A man has two wives. Each of them has a son. The husband lived with the elder wife, and to her son he gave all his property in disregard of the claim of the younger wife's son. Has he a right by law to do so?

A.—A father cannot give the whole of his property to one of his sons.—*Dharwar, May 15th, 1850.*

AUTHORITIES.—(\*1—3) See the preceding two cases; (\*4) Viramitrodaya, f. 172, p. 2, l. 13:—

“If (the father's) desire only were the reason for the allotment of the shares, then this passage of Kātyāyana, ‘But at a partition, made during his life-time, a father shall not give an (undue) preference to one son, nor shall he disinherit a son without a sufficient reason,’ would have no object. ‘He shall not give preference’ means ‘he shall not give him, at his pleasure, a preference other than the share of the eldest and the rest, which have been declared in the law books.’” (See the passage, on which this is a commentary, quoted in Bk. I. Chap. II. Sec. 3, Q. 14; *supra*, p. 111).

REMARKS.—1. A father is not at liberty by way either of gift or of partition to give nearly all the ancestral moveable property to one son to the exclusion of another. (a)

According to the Jewish law “the father had no power of disinheriting his sons, the firstborn received by law two portions, the rest shared equally.” Milman's Hist. of the Jews, Vol. I. p. 172.

As to the earlier English law see above, pp. 214, 670. The Saxon law there noticed agreed with that of the other Teutonic tribes, developed into the German Landrecht, see Laboulaye, *op. cit.* 373, 394. The growth of the power of alienation of immoveable property in Europe is the subject of a learned note by Maynz to his System, § 177.

(a) *Bhujangrav et al v. Malojirav*, 5 Bom. H. C. R. 161 A. C. J. ; *Lakshman Dada Naik v. Ramachandra Dada Naik*, I. L. R. 1 Bom. 561; Coleb. Dig. Bk. V. T. 27; 2 Str. H. L. 435.

2. A man cannot give his whole ancestral estate to his son excluding his grandsons by another son deceased. (a)

3. According to the Benares law he cannot give all his self-acquired property to one son or grandson excluding the others. Prof. H. H. Wilson observes on this subject, in Vol. V. of his Works, at p. 74—" We cannot admit either, that the owner has more than a contingent right to make a very unequal distribution of any description of his property, without satisfactory cause. The onus of disproving such cause, it is true, rests with the plaintiff, and unless the proof were too glaring to be deniable, it would not of course be allowed to operate. We only mean to aver that it is at the discretion of the Court to determine whether an unequal distribution has been attended with such circumstances of caprice for injustice as shall authorise its revisal. It should never be forgotten in this investigation, that wills, as we understand them, are foreign to Hindû law."

As to the attempted validation of such a distribution on the principle of *factum valet*, he says, *ibid.* p. 71—" It is therefore worth while to examine this doctrine of the validity of illegal acts. In the first place, then, where is the distinction found? In the most recent commentators, and those of a peculiar province only, those of Bengal, whose explanation is founded on a general position laid down by Jîmûtavâhana; 'therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one; but the gift or transfer is not null, for a fact cannot be altered by a hundred texts,' Dâyahâga, p. 60. (b) This remark refers, however, to the alienation of property, of which the alienor is undoubted proprietor, as a father, of immoveable property if self-acquired, or a coparcener of his own share before partition; but he himself concludes that a father cannot dispose of the ancestral property, because he is not sole master of it. 'Since the circumstance of the father being lord of all the wealth is stated as a reason, and that cannot be in regard to the grandfather's estate, an unequal distribution made by the father is lawful only in the instance of his own acquired wealth.' Nothing can be more clear than Jîmûtavâhana's assertion of this doctrine, and the doubt cast upon it by its expounders, Raghunandana, Śrî Kṛishna, Tarkâlakâra, and Jaganâtha is wholly gratuitous. In fact the latter is chiefly to blame for the distinction between illegal and invalid acts."

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(a) 2 Macn. H. L. 210.

(b) Stokes, H. L. B. 207.



**Q. 6.**—A man has an odd number of sons and an even number of sons by his “Lagna” and “Pât” wives respectively. How should his property be divided among them? and have both the wives equal rights and position in the eye of the law?

**A.**—The property should be equally divided among the sons of the “Lagna” and “Pât” wives. Both the wives have equal rights and position in the eye of the law. The ceremonies of “Lagna” and “Pât” are however different.

*Dharwar, 1858.*

**AUTHORITIES.**—(1—4) See the three preceding cases.

**REMARK.**—Regarding the position of Pât wives, see remark to Bk. I. Chap. II. Sec. 6A, Q. 37, p. 413.

**Q. 7.**—A shoemaker has four sons, three by his “Lagna” wife and one by his “Pât” wife. Two of the Lagna wife’s sons are minors. The father has divided his property in the proportion of one-half to the son of the “Pât” wife and one-half to the sons of the “Lagna” wife. Is this a legal division?

**A.**—It is ordained in the law that, in the Kali age, (a) a father should divide his property, real and personal, equally among his sons. If any one should divide his property against this rule, it is not legal. A son has the right to prevent his father from making any irregular transfer of his ancestral property. (b) When a man transfers his own property it is necessary that his sons should acquiesce in the father’s disposal of it. If a property has not been properly

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(a) The Hindûs divide their History into four ages, the present (Kali) is the last. Certain laws are said to have been practicable in the former ages and not to be so now.

(b) This answer of the Śāstri illustrates what is said above, pp. 598, 603, 608, 631, 639. In another case a Śāstri said “A man who has adopted cannot alienate immoveable property without good reason. With good reason he may; especially what has been acquired by himself.” MS. 1725.

divided in the first instance, it may be re-divided so as to allot proper shares to the sons.

*Ahmednuggur, July 18th, 1848.*

**AUTHORITIES.**—(1) Mit. Vyav. f. 48, p. 1, l. 8 (*see* Q. 3 of this Sec.); (2) f. 50, p. 1, l. 7 (*see* Chap. I. Sec. 1, Q. 1; (3 & 4) *see* Q. 4 and 5 of this Sec.

**REMARK.**—To give validity to an unequal distribution of the ancestral estate by a father it must be made during his life and with the assent of his sons, indicated by their taking possession of their shares. (a) The father may probably have been moved by a tradition in his caste of a law of *patnibhag*. *See* above, p. 422, and below, Ch. II. Sec. 1, Q. 6.

Q. 8.—A *Paradeśī* (b) has two sons, to the younger of whom he passed a deed of gift, stating that, as his elder son did not support or obey him, he should not lay claim to the house purchased by him, which was granted to the younger, and that the elder son might build a house for his own use on the ground which had descended to him from his ancestors. The younger son was not, however, put in possession of the house, which was occupied by the elder son. The younger has therefore brought an action against him, and the question is, whether the elder son can claim a moiety of the house?

A.—A special grant from a father to his son, as a mark of his affection for him, is legal. If the elder son is an ill-behaved man, he would forfeit his claim to the property of his father, and be entitled only to a maintenance. If the ground, which is the ancestral property of the family, was granted to the elder son with the consent of the younger, the grantee's title thereto must be admitted.

*Ahmednuggur, September 23rd, 1857.*

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(a) *Muttuvengadachellaswamy v. Tumbayaswamy Manigár*, M. S. D. A. B. for 1849, p. 27.

(b) The term means a foreigner, but is usually applied to a Hindū native of Northern Hindustān

**AUTHORITIES.**—(1) *Vīramitrodaya*, f. 50, p. 1, l. 7; (2) f. 50, p. 123, l. 8; (3) f. 175, p. 2, l. 6; (4) *Vyav. May.* p. 124, l. 1; (5) p. 161, l. 8; (6) *Mit. Vyav.* f. 51, p. 1, l. 3; (7\*) f. 46, p. 2, l. 9:—

“But he is subject to the control of his sons and the rest, in regard to the immoveable estate, whether acquired by himself or inherited from his father or other predecessor: since it is ordained, ‘Though immoveables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons.’” *Mit. Chap. I. Sec. 1, para. 27* (Stokes, H. L. B. 375).

See also the authorities quoted under the preceding cases.

**REMARKS.**—1. The father may make a present, but he has, under the *Mitāksharā*, no right to dispose of immoveable property, though acquired by himself, without the consent of all his sons (Auth. 7). If, therefore, the eldest son’s misconduct was not such that he might be called *pitṛdviṣ*, “hater of his father” (for the definition of the meaning, see Bk. I. Chap. VI. Sec. 3 a), and that he could be disinherited on this ground, he will share the father’s property equally with his younger brother.

2. The Bombay High Court, however, allows the father to dispose, at his pleasure, of all self-acquired property. (a) This may be considered the settled doctrine of the Courts, (b) at least as to moveable property acquired without the use of the ancestral estate. (c)

3. By the *Mithilā* law the owner of self-acquired property has complete power to dispose of it. (d) The same rule is implied in *B. Beer Pertab Sahoe v. Rajender Pertab Sahoe*, (e) as operating

(a) *Gangdhāi v. Vāmanaji*, 2 Bom. H. C. R. 304.

(b) *Muddun Gopal Thakoor et al v. Ram Buksh Pandey et al*, 6 C. W. R. 71 C. R.

(c) See Bk. II. Introd. pp. 713, 721; Coleb. Dig. Bk. V. T. 25, 27.

(d) *Vivāda Chintāmani*, p. 76; *R. Bishen Perakh Narain Singh v. Baava Misser et al*, 12 B. L. R. 430 P. C.

Expressions equally strong in other treatises are however explained as leaving the father still subject to the prohibitions against unequal partition, except according to the rules of deduction, by some recognised as still operative. See *Dāyakrama-Sangraha*, Chap. VI. paras. 11-14 (Stokes, H. L. B. 510-11); *Smṛiti Chandrikā*, Chap. II. Sec. 1, paras 19, 20, 24, compared with *Nārada*, Pt. I. Chap. III. Sl. 36, 40, and Pt. II. Chap. XIII. Sl. 14, 15, 16; and as to the *Mithilā* doctrine itself, see the *Vivāda Chintāmani*, p. 309.

(e) 12 M. I. A. 1.

under the Mitāksharā law with respect to moveable, but not as to immoveable property. (a)

4. As to unequal disposal by will, the law of wills follows the analogy of the law of gifts, (b) "and one leaving male descendants, may [by will] dispose of self-acquired property, if moveable, subject perhaps to the restriction that he cannot wholly disinherit any one of such descendants. In the *Bithoor* case, (c) the testator, having real as well as personal estate, made an unequal distribution of both amongst his sons, and his legal power to do so was affirmed by this Committee." (d)

5. The fact that a sale as to a small proportion was made for immoral purposes will not, even as to ancestral property, vitiate it as against the sons. (e) Sons unborn at the time of a sale have no *locus standi* afterwards to impeach it. (f)

(a) See Mit. Chap. I. Sec. I. paras. 21, 27; Vyav. May. Chap. IV. Sec. I. para. 5; Viramit. Tr. p. 74, 55, 68. A son's alienation without his father's consent was held invalid, *Sheo Ruttun Koonwar v. Gour Behares Bhukut et al*, 7 C. W. R. 449. And a son has a right during the lifetime of his father to set aside an alienation of ancestral property made without his consent, *Aghory Ram Sarag Singh v. J. Cochrane et al*, 5 Beng. L. R. 14 Appx.

Alienation of property with assent of undivided, without assent of divided sons, was held valid, *Tirbegnee Doobey et al v. Jutta Shunker et al*, Agra S. D. A. R. for 1862, p. 71.

So alienation by an uncle without assent of his nephew, *Gopall Dutt Pandey et al v. Gopallal Misser*, Calc. S. D. A. R. for 1859, p. 1314.

(b) *Jotindra Mohan Tagore v. Ganendra Mohan Tagore*, 9 Beng. L. R. at p. 398 C. R. (P. C.)

(c) *Nana Narain Rao v. Haree Punth Bhao et al*, 9 M. I. A. 96.

(d) P. C. at 12 M. I. A. p. 38; see above, pp. 713, 721, 667 ss; *Lakshmi Bai v. Ganpat Moroba*, 5 Bom. H. C. R. 135 O. C. J; Bk. I. Chap. II. Sec. 14, I. A. 4, Q. 9; 2 Str. H. L. 407 (as to a widow's will); *Narottam v. Narsandas*, 3 Bom. H. C. R. 6 A. C. J; *Lakshman Dada Naik v. Ramachandra Dada Naik*, I. L. R. 1 Bom. 561. In appeal the Privy Council decided that ancestral property could not be alienated as against a co-sharer (a son) by will, L. R. 7 I. A. 181. See above, p. 288; *Bhagvan Dullabh v. Kala Shankar*, I. L. R. 1 Bom. 641, for a nuncupative will.

(e) Though their assent is generally requisite. Steele, L. C. 58, 68, 404, 210.

(f) S. A. No. 124 of 1876, *Kastur Bhavani v. Appa and Silaram*, Bom. H. C. P. J. F. for 1876, p. 162. See Bk. II. Chap. I. Sec. 1, Q. 8.

## SECTION 3.—THE MOTHER'S SHARE.

**Q. 1.**—A man had two sons. He proposed that his property should be divided into three shares, two to be assigned to the sons, and one to himself. The division was carried into effect to a certain extent. The sons, however, disagreed and prevented the division from being fully enforced. Their mother held with the elder son, and the father with the younger. The elder son has sued the younger for one-half of the father's property. The father states that he is at liberty to dispose of his property in any manner he pleases. Is there any legal objection to the claim?

**A.**—The father divided his property into three shares, but it would have been more in accordance with the Śāstra had he divided it into four shares, three to be assigned as above, and one to his wife. The original acquirer is, however, at liberty to dispose of his property in any way he likes. The elder son, therefore, has no right to sue the younger for an equal share of the patrimony.

*Ahmednuggur, April 28<sup>th</sup>, 1847.*

**AUTHORITIES.**—(\*1) Mit. Vyav. f. 48, p. 2, l. 10 (see Bk. II. Chap. I. Sec. 2, Q. 4); (2) Mit. Vyav. f. 47, p. 2, l. 3:—

“If he make the allotments equal, his wives, to whom no separate property has been given by the husband or father-in-law must be rendered partakers of like portions. (Mit. Chap. I. Sec. 2, para. 8; Stokes, H. L. B. 379).

(3) Mit. Vyav. f. 50, p. 1, l. 11:—

“The first text ‘When the father makes a partition, &c.’ (Sec. II. § 1.) refers to property acquired by the father himself. So does that which ordains a double share: ‘Let the father, making a partition, reserve two shares for himself.’ The dependence of sons, as affirmed in the following passage, ‘While both parents live, the control remains, even though they have arrived at old age,’ (a) must relate

(a) This passage is not translated quite correctly. It ought to stand thus:—“While both parents live, he (the son) is dependent, though he may have arrived at old age.” Colebrooke says, “The power of giving is not restrained, unless, in the case of land, the

to effects acquired by the father and the mother. This other passage, 'They have not power over it (the paternal estate) while their parents live,' must also be referred to the same subject." (Mit. Chap. I. Sec. 5, para. 7; Stokes, H. L. B. 392.)

**REMARK.**—The mother is entitled to a share (Auth. 1), and a division made by the father, without taking into account her rights, is liable to re-adjustment (Auth. 2). (a) Under the Hindû law the father cannot directly divide his property in any way he likes. Considerable restrictions are placed on his power even as to self-acquired property, by the Mit. Chap. I. Sec. 2. (b) The decisions of the English Courts, however, allow it as to self-acquired property, relying on a passage (c) which the Śāstri also in this answer appears to understand as conferring the power. The eldest son cannot enforce a partition of his father's self-acquired property (Auth. 3).

## CHAPTER II.

### PARTITION BETWEEN OTHER COPARCENERS.

#### SECTION 1—BETWEEN BROTHERS.

**Q. 1.**—Would it be lawful for brothers to divide their property, when the son of a deceased brother is a minor?

**A**—Yes.—*Tanna, December 21st, 1858.*

**AUTHORITIES.**—(1) Viram. f. 170, p. 1, l. 1; (2) f. 182, p. 1, l. 1; (3) f. 181, p. 2, l. 16 (*see* Bk. II. Chap. I. Sec. 1, Q. 7); (4) Mit. Vyav. f. 46, p. 2, l. 14.

**REMARKS.**—1. *See* 2 Str. H. L. 362.

2. In the absence of unfairness, infants are bound by a division in which they were represented by their mother as guardian. But a partition cannot ordinarily be demanded on their behalf. (d)

owner having male issue living, or, in that of the whole property, leaving the family destitute." 2 Str. H. L. 6, 9, 10.

(a) *See* Introd. § 4 r, and below, Chap. II. Sec. 2, Q. 3.

(b) *See* also Colebrooke, Dig. Bk. V. Chap. I. T. 27.

(c) Mit. Chap. I. Sec. 5, para. 10; Stokes, H. L. B. 393.

(d) *See Lakshmibai v. Ganpat Moroba et al*, 4 B. H. C. R. 153 O. C. J.; 2 Str. H. L. 310. *See* also Introd. to Bk. II. § 4 c. 3, p. 672.

**Q. 2.**—Of four brothers the existence of two cannot be ascertained. Can the remaining two divide their property equally between them?

**A.**—They cannot do so. The absent brothers will be entitled to their shares, whenever they may claim them.

*Dharwar, March 31st, 1857.*

**AUTHORITIES.**—(1) Mit. Vyav. f. 49, p. 1, l. 10; (2) Viramitrodaya, f. 181, p. 2, l. 16 (*see* Bk. II. Chap. I. Sec. 1, Q. 7).

**REMARK.**—The absence of the two brothers is no bar to the division of the estate. Their shares should, however, be set apart and kept intact. *See Nanaji v. Tukaram*, (a) the decision in which, however, was based on the plaintiff's having been turned adrift within the statutable period. (b)

**Q. 3.**—There are three brothers. One of them is absent in a distant part of the country. The two are in possession of the property. One of them claims one-half of it. Can he have so much? Can the fact of the absentee being a bachelor or married have any effect on the division?

**A.**—If a brother is not married, the expenses of his marriage should be defrayed from the common stock. (c) The remainder will be divided; one brother has no right to demand one-half of the property, merely because another is absent.—*Ahmednuggur, July 25th, 1848.*

**AUTHORITY.**—*See the preceding case, and also the remark on it.*

**Q. 4.**—A deceased man has left two sons, one of them has one son and the other has two. How should the property be divided among them?

**A.**—The father of the two sons should take one-half of the property and equally divide it between his two sons. The father of the one should take the other half.

*Dharwar, January 8th, 1852.*

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(a) R. A. No. 46 of 1871, Bom. H. C. P. J. F. for 1871.

(b) *See* also 2 Str. H. L. 396, 327; Colebrooke, Dig. Bk. V. T. 394; Vyav. May. Chap IV. Sec. 4, para. 24; Stokes, H. L. B. 54; Introd. to Bk. II. § 4 c. 4, p. 676.

(c) *See* Steele, L. C. 404.

AUTHORITY.—\*Mit. Vyav. f. 47, p. 2, l. 14 :—

“Let sons divide equally both the effects and the debts after [the demise of] their two parents.

“[After their two parents]. After the demise of the father and mother: here the period of the distribution is shown. [The sons.] The persons, who make the distribution, are thus indicated. [Equally.] A rule respecting the mode is declared: in equal shares only should they divide the effects and debts.” Mit. Chap. I. Sec. 3, paras. 1 and 2 (Stokes, H. L. B. 381).

REMARK.—If the sons of the second brother demand a division of their father's ancestral estate, his portion must be divided into three shares, one for the father and one for each son.

Q. 5.—A man was granted a piece of land as a charity. The grantee is now dead, and the land is in the possession of one of his sons. The other son has instituted a suit against his brother for the recovery of one-half of the land as his share of the property. The question is whether land granted as a charity is divisible?

A.—If the land was the property of the father and if it has not been alienated by him, his sons will be entitled to equal shares of the property.—*Surat, August 21st, 1845.*

AUTHORITY.—\* Mit. Vyav. f. 47, p. 2, l. 14 (*see the preceding question*).

REMARKS.—The answer is right only under the supposition that the land was not given for some particular purpose, *e. g.* the continual performance of an Agnihotra. If such a condition had been attached to the gift, the eldest son, who alone would be entitled to perform the ceremonies, would also alone inherit the land. This rule follows from the maxim, that “whatever has been given for religious purposes must be used for the stated purposes only.” (a) Places of worship and sacrifice are not divisible. The parties are entitled only to their turns of worship. (b) The Courts have recognized

(a) Vyav. May. Chap. IV. Sec. 7, para. 23; Stokes, II. L. B. 79. Quod divini juris est id nullius in bonis est. Sec. De Divis. Rer. Di. Li. I. Ti. VIII. Fr. VI. § 2.

(b) *Anund Moyee Chowdhruin et al v. Boykantnath Roy*, 8 C. W. R. 193, C. R.; *Mitta Kunth v. Neerunjun*, 14 Beng. L. R. 166, and *see*



the illegality of a dealing with religious endowments, which by introducing strangers would make the worship impracticable or otherwise defeat the purpose of the founder, but this objection does not generally apply to alienations within the family designated as to furnish worshippers. (a)

Q. 6.—A man died, leaving two widows, who live separately. The one has one son and the other has two. How shall the property of the deceased be apportioned between the two widows on account of their respective sons.

A.—The property should be divided into as many equal shares as the number of the sons, and each mother should, in her capacity of guardian, take as many of them as the number of her sons.—*Khandesh, December 16th, 1858.*

AUTHORITY.—\* Vyav. May. p. 97, l. 7 :—

“Bṛhaspati gives this apposite example, “Among brothers, who are equal in class, but vary in regard to the number [of sons produced by each mother], the shares of the heritage are allotted to the males [not to their mothers]”. (Mayūkha, Chap. IV. Sec. 4, para. 26; Stokes, H. L. B. 54).

REMARKS.—1. Widows have no right to their husband's estate during the life-time of their sons, and it is, therefore, impossible that the partition should be made through them. But if a man leave two or three wives, who have an equal number of sons who are minors, circumstances may arise, which make a division into two or three shares more advantageous than one into many, and in that case the Hindū law is not opposed to a “division according to mothers.” Even if the sons be unequal in number, a proportional allotment might be made. (b) This appears to be the sense in which Nīlakan-

also the case of *Nobkissen Mitter v. Hurrischunder Mitter*, East's Notes of Cases, 2 Morley's Digest, p. 146.

(a) *Rajah Vurmah Valia v. Ravi Vurmah Kunhi Kutty*, I. L. R. 1 Mad. 235; *Manchārām v. Prānshankar*, I. L. R. 6 Bom. 298; *Ganesh Moreswar v. Prabhakar Sakhamam*, Bom. H. C. P. J. F. 1882, p. 181; *Anuntha Tirtha Chariar v. Nāgamuthu Ambalagaram*, I. L. R. 4 Mad. 200; *Śītarambhat v. Śītaram Ganesh*, 6 Bom. H. C. R. 250 A. C. J.

(b) According to Ellis, 2 Str. H. L. 176, 355, 357, 425, a true *patnī-bhāga* prevails among some classes in Madras, an equal share being allotted to the family by each wife. Colebrooke approves this where

tha took the passage of Bṛihaspati and Vyása, quoted by him.(a) In any other sense Patnibhāga would probably not be recognized.(b)

2. The widows are, however, entitled to a share each. A claim for partition must on this account be scrutinized, not granted as of course while the children are minors, as by delay their portions may improve. A kind of patnibhāga would arise in the way suggested by Jagannātha, (c) by equal division according to the number of all wives, and then a subdivision of the portions falling to all born of the same mother, by their number plus one, so as to afford her a share equal to each of her own sons. (d) In this way each son's share would be larger in proportion as he had more uterine brothers. (e) This seems to agree with the Śāstri's opinion and with the Vyav. May. The passages determining the shares of wives having sons, when their husband distributes the property, seem to admit of a corresponding construction. (f) The rule had reference originally, it would seem, to sons by mothers of different castes, but this cause of difference no longer operates. (g)

In the case (a Bombay case) at 2 Str. H. L. 404, there would seem to have been a partition, whereby one of two widows was allotted her own share only, she being the mother of a daughter but not of

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it is supported by custom. See Coleb. Dig. Bk. V. T. 59, 62. But see also T. 63, which prescribes equal shares for all sons of equal class.

A similar custom in the Panjab is noted; Tupper, Panj. Cust. Law, Vol. I. pp. 72, 78. The tribes, however, appear to be Mahomedans by faith, though they follow some Hindū usages.

(a) May. Chap. IV. Sec. 4, para. 25; Stokes, H. L. B. 54. See also Colebrooke, Dig. Bk. V. T. 62, 63.

(b) *Moottoorengadachellasawmy v. Toombayasawmy et al*, M. S. D. A. R. for 1849, p. 27.

(c) Vide Coleb. Dig. Bk. V. T. 89.

(d) Mothers take shares according to the shares of their sons, Vīram. Tr. pp. 79, 80. Vishṇu, cited by Varadrāja (by Burnell), p. 19; so also Dāyakrama-Sangraha, Chap. VII. p. 2, quoting Bṛihaspati; Stokes, H. L. B. 513.

(e) See Coleb. Dig. Bk. V. T. 89, Comm.

(f) Mit. Chap. I. Sec. 2, para. 9; Stokes, H. L. B. 379; Vyav. May. Chap. IV. Sec. 4, para. 18; *ibid.* 52.

(g) Coleb. Dig. Bk. V. T. 86, Comm.

a son, while the remainder was given to her co-widow and the two sons by her. In an ordinary partition step-mothers, though sonless, are entitled to equal shares. (a)

**Q. 7.**—A person of the goldsmith caste had two wives, one of whom has three sons and the other one. How should the ancestral property be divided among them?

**A.**—A larger share being allotted to the eldest, the rest should be equally divided among the other three.

*Sholapore, January 17th, 1846.*

**AUTHORITIES.**—(1) Vyav. May. p. 97, l. 7 (*see the preceding question*); (\*2) Mit. Vyav. f. 48, p. 1, l. 8 (Bk. II. Chap. I. Sec. 2, Q. 3); (\*3) f. 47, p. 2, l. 14 (Bk. II. Chap. II. Sec. 1, Q. 4).

**REMARKS.**—1. The eldest does not receive any larger share than the others. (Auth. 2.)

2. The estate must be divided into six equal shares, as the mothers receive shares as well as the sons. (Auth. 3.) According to some authors quoted by Jagannātha, the passage of Yājñavalkya relates only to soulless wives, (b) but this does not seem to be the accepted theory, now that unequal partition is abolished.

**Q. 8.**—There are three brothers, of whom one is unmarried. A house belonging to their father is to be divided among them. The question is, whether it should be equally divided among the three, or whether the whole or a large part of it should be given to the unmarried brother? Another question in connection with this case is, whether an elder son can mortgage his house during the lifetime of his mother?

**A.**—If a brother is unmarried, a sum sufficient to defray the expenses of his marriage should be first set aside from

(a) Mit. Chap. I. 397, Sec. 7, para. 1 (Stokes, H. L. B. 397); Vyav. May. Chap. IV. Sec. 4, pl. 19 (*Ib.* 52); Coleb. Dig. Bk. V. T. 83, 84, 85, Comm., where the string of arguments and distinctions, that Jagannātha at last rejects, must not be mistaken for his own.

(b) Coleb. Dig. Bk. V. T. 83, 84, Comm.

the common property, and then the rest equally divided among them. If the property is just sufficient for the expenses of the marriage, the whole may be set aside for the purpose. (a) The house cannot be mortgaged without the consent of all the brothers having a share in it. The consent of the mother is not required. If, however, some of the brothers are absent, and the money is required for an urgent necessity of the family, one of them can mortgage the house. (b)

*Poona, August 10th, 1851.*

**AUTHORITIES.**—(1) Mit. Vyav. f. 69, p. 1, l. 8; (2) f. 47, p. 2, l. 10; (3) f. 46, p. 2, l. 11; (\*4) f. 51, p. 1, l. 7 (*see* Bk. II. Chap. II. Sec. 2, Q. 1); (5) f. 46, p. 2, l. 11 :—

“If any of the brethren be uninitiated when the father dies, who is competent to complete their initiation? The author replies: ‘Uninitiated brothers should be initiated by those for whom the ceremonies have been already completed.’

“By the brethren, who make a partition after the decease of their father, the uninitiated brothers should be initiated at the charge of the whole estate.” Mit. Chap. I. Sec. 7, paras. 3 and 4 (Stokes, H. L. B. 398).

**REMARKS.**—1. Compare also the rules of Nârada Dâayavibhâga, Chap. XIII. vs. 33 and 34. (c)

2. As to the concurrence of all the coparceners being necessary, *see* the *Introd.* to this Book, pp. 600, 603. (d)

Q. 9.—(1). Three daughters of one and one of another brother were married when the family was undivided. Afterwards, when they separated, the brother, whose one daughter only was married, objected to his brother's taking an equal share of the family property on the ground of a large expense

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(a) Steele, L. C. pp. 57, 404.

(b) *See* Steele, L. C. pp. 399, 400.

(c) The joint property must provide for the weddings of the unmarried brothers and sisters amongst Śûdras, 2 Str. H. L. 354.

(d) In the Panjab the consent of all the co-sharers is generally essential to a gift of even less than the donor's share, Panj. Cust. Law, Vol. II. p. 167.

having been thrown upon the resources of the family by the marriages of his three daughters. Is this a proper objection? Should the brother, whose three daughters were married, have a smaller share of the property?

(2) Suppose the case stands as follows :—Three daughters of one brother were married. After this, the other brother became separate and got his daughter married. When the brothers subsequently came to actually divide the property, the father of one daughter proposed that the expense which he had incurred on account of the marriage of his daughter should be paid to him from the property, and that it should then be equally divided between them. Is this a just proposal?

A.—(1) The brother, whose three daughters were married during the union of the family, is entitled to a half of his father's property.

(2) In the other case, the proposal made by the father of one daughter is proper.—*Sadr Adálat, June 22nd, 1825.*

Authority not quoted.

REMARKS.—1. The correctness of para. 1 of the Śāstri's answer follows from the fact that the duty of marrying a girl lies with her father.

2. The second part of the answer is based on the maxim that all expenses of united brothers must be defrayed out of the family estate. For the two brothers, though one 'became separate,' still were members of a united family, because a partition of the estate had not taken place. (a)

Q. 10.—A lunatic has a son and a wife. Can his brother, who is not separated from him, claim the share of a certain property, to which the lunatic is entitled?

A.—A man, who is blind, lame, mad, &c., forfeits his right to a share of the family property, but a son of such a person, if not labouring under a similar disqualification, can claim the share due to his father.—*Tanna, February 24th, 1853.*

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(a) See Colebrooke, Dig. Bk. V. T. 136, 373; and Jagannátha's Commentary, 2 Str. H. L. 394.

AUTHORITIES.—(1) Mit. f. 60, p. 1, l. 13; (2) f. 60, p. 2, l. 8:—

“But their (the lame, blind, &c., man’s sons,) whether legitimate, or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects.” (Mit. Chap. II. Sec. 10, para. 9; Stokes, H. L. B. 457.)

REMARK.—See Introd. to Bk. I, “PERSONS DISQUALIFIED, &c.” In the case of *Koer Sheopershad Narain v. The Collector of Monghyr et al.*, (a) it is said that an idiot, though excluded from inheritance, may take by conveyance. The source of the disabled member’s title therefore is of importance.

Q. 11.—Is an elder brother entitled to the right side of a house whether it be of a more or less value, or should he receive a share which is equal in point of value on whatever side it might be?

A.—It is a custom to assign the right side of a house to the elder brother. It will rest with the Court to decide how far the custom should be respected.

*Ahmednuggur, July 29th, 1848. (b)*

Q. 12.—A deceased man has left two sons. They are engaged in a dispute regarding the division of a house. Their father has not left any writing as to the side of the house on which each of his sons should take his share of it. The question is, whether the share of the elder son should be on the right side of the house?

A.—The usage allows the elder son to have his share on the right side, but in the book called “*Śāntiratnākara*,” it is stated that the elder brother should have his residence on the western side of a house. The western part of the house therefore should be assigned to the elder brother.

*Poona, August 22nd, 1853.*

(a) 7 C. W. R. 5 C. R.

(b) Similar answers were received from *Rutnagherry, December 17th, 1859; Poona, December 15th, 1859; Tanna, March 9th, 1860.*

Q. 13.—There are four shares in a house, three belong to the sons and the fourth to their mother. On what side of the house should the second son have his share?

A.—There are no provisions in the Śāstras on the subject.—*Rutnagherry, November 23rd, 1846.*

## SECTION 2.—THE MOTHER AND SON.

Q. 1.—If a mother and her son do not wish to live together as an undivided family, can the mother claim a share?

A.—If the property is ancestral or acquired conjointly by the mother and her son, it should be equally divided between them. The mother should support herself from the proceeds of her share, but cannot dispose of it by gift or sale. On her death her son will inherit it.

*Rutnagherry, October 27th, 1851.*

AUTHORITY.—Mit. Vyav. l. 51, p. 1, l. 7 :—

“Of heirs dividing after the death of the father, let the mother also take an equal share.” (Colebrooke, Mit. Chap. I. Sec. 7, para. 1; Stokes, H. L. B. 397.)

REMARKS.—1. The text shows only *the right of the mother to a share*, in case a partition is made, but not her right to *demand a partition*. The latter right does not exist, and it would therefore seem that in the case in question, where there is only one son, she cannot ask for a division. (a) So too, though sons acquire a right in their mother's property by birth, they cannot exact a partition of it during her life. (b) If a partition should be made the mother takes a share equal to her son's. (c)

2. As to the nature of the mother's estate in the portion allotted to her, see 2 Str. H. L. 294, 383, where Colebrooke shows that, according to the Mitāksharā, there is an absolute assignment of a share, not a mere setting apart of a maintenance, though maintenance be the

(a) See also Introd. to Bk. II. § 3 A. Rem. 2; and § 4 c. Rem. 5.

(b) Viram. Tr. p. 228.

(c) So too does a grandmother. The same rule applies in the case of an adopted son. See *Thukoo Bae v. Ruma Bae Bhide*, 2 Borr. R. 488.

object of the assignment. (a) In the case at 2 Str. H. L. 404, the Śāstri's opinion has not been preserved. The English scholars, consulted by Sir T. Strange, seem not to have been able to make up their minds as to the law of the Mitāksharā on the point submitted to them. The allotment to the mother, however, is by Mit. Chap. I. Sec. 7, pl. 2 ss, (b) put on the same footing precisely as that assigned to a daughter, in which it has never in Bombay been contended that a full ownership does not subsist; and Chap. II. Sec. 1, pl. 31, 32, (c) use the analogy of the complete ownership arising to the mother, on a partition, as an argument for the widow's sole succession, when no son is left to share the property with her. (d)

Q. 2.—Can a son and his mother divide the family property between themselves?

A.—The Śāstra declares that if sons, after the death of their father, should divide their property, a share of it, equal to that which is taken by each of the sons, should be allotted to their mother.

*Ahmednuggur, November 29th, 1855.*

AUTHORITIES.—(1) Mit. Vyav. f. 47, p. 2, l. 13; (2) f. 26, p. 2, l. 9; (3) f. 46, p. 1, l. 9; (4) f. 46, p. 2, l. 14; (5) f. 51, p. 1, l. 7 (see the preceding question); (6) Mit. Āchāra, f. 12, p. 1, l. 4; (7) Vyav. May. p. 175, l. 8.

Q. 3.—Three sons of a man became separate and received their shares of the common property. They did not, however, set apart a share for their mother. Can the deed of division framed by the sons be considered valid?

A.—The deed of division may be considered valid, but the sons should be obliged to give a share to their mother.

*Rutnagherry, June 12th, 1851.*

AUTHORITIES.—(1) Mit. Vyav. l. 47, p. 2, l. 13; (2) f. 51, p. 1, l. 7 (see the first question of this Section); (3) Vyav. May. p. 90, l. 2, 3.

REMARK.—See Introd. to Bk. II. § 4 E, and also pp. 303, 777, 780.

(a) See also Coleb. Dig. Bk. V. T. 87, Comm.

(b) Stokes, H. L. B. 397.

(c) Stokes, H. L. B. 436.

(d) See the Introd. to Bk. II. "RIGHTS AND DUTIES ARISING ON PARTITION," and Bk. I. Chap. II. Sec. 6A, Q. 6.



**Q. 4.**—In order to recover the amount of a decree passed in his favour, a man has attached a house of his debtor. The house was once the property of the debtor's father. The debtor's mother claims the removal of the attachment from a half of the house. She alleges that the house was once her husband's property, and that she therefore has a right to one-half of it. The question is, whether the widow of the owner of the house has a claim to any part of the house while her sons are still living? and if so, to what extent?

**A.**—A son after the death of his father acquires a perfect right to his property, and while sons are alive, the widow has no claim to his property. She cannot, therefore, claim any share of the house.—*Surat, December 19th, 1850.*

**AUTHORITIES.**—Vyav. May. Dāyabhāga, p. 83, l. 7 (Stokes, H. L. B. 42); Vyav. May. R̥ṇādāna, p. 179, l. 6 (Stokes, H. L. B. 121).

**REMARK.**—Though the mother cannot claim a partition of the house, still she has a claim to maintenance out of the family property, (a) extending in amount to a son's share. (b) It seems necessary, therefore, that her rights should be protected against the creditors of her son to this extent, just as those of a separated brother would be. In *Ruttunchund v. Gholamun Khān* (c) it was held that a widow of one of three undivided brothers has no such right to a share of a house, the joint property of the family, as to prevent an effective sale by the surviving brothers, and *Jivan v. Kasi Ambiadās* (d) was decided on the same principle (e); but the Sholāpoor Śāstri pronounced against the validity of the sale, which moreover was by one brother of his share in the ancestral family house to

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(a) See Introd. to Bk. II. Sec. 7 A. 1 b.

(b) Step-mothers also have a claim to maintenance against their step-sons, taking the paternal or ancestral estate, 2 Str. H. L. 315.

(c) N. W. P. Rep. for 1860, p. 447.

(d) 8 Harr. 172.

(e) A widow having sued a mortgagee from her son for a declaration of her right as against the mortgaged property to maintenance and recoupment of her daughter's marriage expenses, it was held that she might, under her general prayer for relief, be awarded the amount to which on these accounts she should be found entitled, *S. Nistarini Dossee v. Mokhun Lall Dutt et al*, 17 C. W. R. 492.

another brother. (a) Subject perhaps to the right of widows to residence, partition of the dwelling may, it seems, be claimed and enforced. (b)

### SECTION 3.—BETWEEN REMOTER RELATIONS.

Q. 1.—One of two brothers left the country and died 40 years ago. His son, who grew up in the house of his maternal uncle, claims from his paternal uncle a share of his moveable property.

A.—He cannot claim a share of whatever his uncle may have acquired by his own labour, without using the claimant's father's means for its acquisition.—*Poona, October 18th, 1845.*

AUTHORITY.—\* Viramitrodaya, f. 177, p. 1, l. 6. See Introd. to Bk. II. § 3 A. *supra*, p. 654.

Q. 2.—A paternal uncle and a nephew, who were united in interests, agreed to an unequal division of property between them. Can they do so?

A.—If the nephew has taken a small share of the property from his uncle and given him a deed of acquittance, he is at liberty to do so. Ordinarily he is entitled to an equal share with his uncle.—*Ahmednuggur, December 30th, 1846.*

AUTHORITY.—\* Viramitrodaya, f. 177, p. 1, l. 6. See Introd. to Bk. II. § 3 A, *supra*, pp. 653, 654, 663.

Q. 3.—Two brothers separated, but did not divide their moveable and immoveable property. Can the son of one of them file a suit for a share of the common property?

A.—Yes, he can. The property, acquired during the time when the family was united in interest, must be divided into as many shares as the number of brothers owning it. If one of them is dead, his share can be claimed by his son and grandson.—*Ratnagherry, January 20th, 1846.*

(a) See the cases cited in the Introduction to Bk. I. page 252.

(b) *Hullodhur v. Ramnath*, 1 Marsh. 35. The occupation of a house by a widow is equivalent to notice of her right to residence. *Dalsukhram v. Lallubhai*, Bo. H. C. P. J. 1883, p. 106.

**AUTHORITY.**—\* Viramitrodaya, f. 177, p. 1, l. 7. See Introd. to Bk. II. § 3 A. *supra*, p. 653, 654.

**REMARK.**—Cesser of commensality is a strong but not conclusive evidence of partition. (a) A question of limitation or prescription would now in some cases arise under Reg. V. of 1827, and the successive Limitation Acts down to Act XV. of 1877. (b) See Introd. to Bk. II. SEPARATION.

**Q. 4.**—A deceased person left seven sons, of these three are alive and four dead. Of those that died, three have left one son each and the fourth no son. The deceased father's property consists of one house only. How should each of these sons be allowed to share in the patrimony? Can the share of the brother who died without leaving a son be claimed by all the brothers? Can the sons of the brothers previously deceased claim the share of the brother who has now died? If so, how should each be allowed to share in it?

**A.**—It appears that the father died leaving seven sons, and that one of them died and has left no sons. His share should be equally divided by the surviving brothers and the three sons of the deceased brothers. The house should be considered divided into six shares, and one share should be assigned to each member of the family.

*Broach, September 7th, 1848.*

**AUTHORITIES.**—(\*1) Mit. Vyav. f. 50, p. 1, l. 7 (see Bk. II. Chap. I. Sec. 1, Q. 1); (\*2) Viramitrodaya, f. 177, p. 1, l. 6 (see Introd. to Bk. II. § 3 A.)

**REMARK.**—The son of each of the predeceased brothers succeeds to his father's share. (c)

(a) *Musst. Anundee Koonwar v. Khedoo Lal*, 14 M. I. A. 412.

(b) According to the Hindû Law, the right to demand a partition of property solely possessed continues through four generations of persons present, and seven of absentees, *Moro Vishvanath et al v. Ganesh Vithal et al*, 10 Bom. H. C. R. 444; 2 Str. H. L. 396; see Steele, L. C. 219.

(c) See *Gungoo Mull v. Bunseedhur*, 1 N. W. P. R. 79; *Duljeetsing v. Sheomunook Sing*, 1 Calc. Sel. R. 59; *Debi Parshad et al v. Thakur*

**Q. 5.**—Two brothers paid money in equal proportions, and received a house in mortgage. They subsequently died, one leaving a son and the other a grandson. Unequal portions of the house had however passed into their possession, and the question is whether or not each party has a right to an equal share?

**A.**—Each has a right to an equal share, and the heirs of the mortgagees may divide it so.—*Ahmednuggur, May 8th, 1851.*

**AUTHORITIES.**—(1) *Viramitrodaya*, f. 177, p. 1, l. 6 (*see* *Introd.* to *Bk. II.* § 3 A. *Rem.* 1); (2) *Vyav. May.* p. 89, l. 2; (3) p. 169, l. 6; (4) p. 171, l. 6; (5) p. 96, l. 2.

## CHAPTER III.

### MANNER AND LEGALITY OF PARTITION.

#### SECTION 1.—DISPOSAL OF NATURALLY INDIVISIBLE PROPERTY.

**Q. 1.**—Can a village held on Inâm tenure be divided?

**A.**—Any property, which, if divided, would not yield equal profit, may be enjoyed by each of the co-sharers in rotation for a certain fixed period.—*Dharwar, September 14th, 1852.*

**AUTHORITY.**—*Vivâdabhangârâva*, in the Chapter called Indivisible Property.

**REMARKS.**—1. The question is too general to admit of an exact answer. For it is not clear of what nature the Inâm grant was. Usually Inâms, which are merely tax-free property, or which consist in the Government share of the produce of the land, are divisible either by an actual apportioning of the land or by a division of the produce. (a)

*Dial et al*, I. L. R. 1 All. 105; *Bhimul Doss v. Choonee Lall*, I. L. R. 2 Calc. 379, referring to *Katama Natchiar v. The Rajah of Shivagunga*, 9 M. I. A. at p. 611.

(a) *See Ruvee Bhudr v. Roopshunkur et al*, 2 Borr. 730; *Shib Narain Bose v. Ram Nidhee Bose et al*, 9 C. W. R. 87 C. R.; *see* *Bk. I. Chap. II. Sec. 6 A, Q. 8*, p. 397. *Steele, L. C.* 215, 218, 229, 230, show how estates held free or for service are dealt with.

2. In one case the Sadar Court of the N. W. Provinces ruled that a partition might be refused where it would be obviously detrimental to the interests of the sharers resisting it, (a) but this is not supported by the Hindû authorities; and when a partition legally claimed is objected to on the ground of inconvenience, some more convenient method of distribution must be shown by the objector. (b) Partition of a Court-yard, advisedly reserved for common enjoyment, was refused in *Gopala Achyarya v. Keshav Daje*. (c)

Q. 2.—One of three brothers, who lived as members of an undivided family, died. Can his widow sue on behalf of her son, who is a minor under her protection, for a share of the family property? and can the idols be divided?

A.—The woman cannot claim a share of the property, unless it be shown that her brothers-in-law are likely to defraud her. The idols may be divided as any other property.

*Poona, August 5th, 1852.*

AUTHORITIES.—(1) Vyav. May. p. 127, l. 7; (2) Vivâdabhangârnava; (3) Vīramitrodaya, f. 181, p. 2, l. 16 (see Bk. II. Chap. I. Sec. 1, Q. 7).

REMARKS.—1. The mother can sue for a division, under the conditions stated, if she is the guardian of her son. (d)

2. The custom regarding family 'idols' is stated to be as follows:—

(a) If there is only one image it is given to the eldest son. (e)

(b) If there are several images, the eldest son receives the principal idol, and the rest are divided. (f)

If property has been dedicated to a family idol, the members are entitled to worship and take the emoluments in rotation. (g)

(a) *Durbaree Singh et al v. Saligram et al*, N. W. P. Sel. Dec. 1852, p. 271.

(b) *Summun Jha et al v. Bhooput Jha et al*, 18 C. W. R. 498.

(c) S. A. No. 240 of 1876, Bom. H. C. P. J. F. for 1876, p. 244.

(d) See Introd. to Bk. II. p. 672.

(e) Comp. Steele, L. C. p. 179.

(f) The eldest sometimes retains all the images, as in the case at Steele, L. C. p. 222.

(g) See Introd. to Bk. II. p. 730.

**Q. 3.**—Two brothers possess a proprietary right to a well and use the water to irrigate their respective fields by turns. Can the right of one brother to a half of the well be sold in payment of his debts?

**A.**—The well cannot be sold, the debtor having a right only to use it in his turn. A well or door, which is the common property of a family, and which cannot be divided, can only be used by those who have the limited enjoyment of it.—*Ahmednuggur, December 19th, 1854.*

**AUTHORITIES.**—(1) *Vyav. May.* p. 125, l. 5 :—

Other things exempt from partition have been enumerated by *Manu* :—

“Clothes, vehicles, ornaments, prepared food, water, women, sacrifices and pious acts, as well as the common way, are declared not liable to distribution.” (*Borradaile, May. Chap. IV. Sec. 7, para. 15* (*Stokes, H. L. B. 77*).

(2) *Vyav. May.* p. 127, l. 1 :—

“*Brihaspati*: They by whom it is affirmed that clothes and the like are indivisible have not proved that the collected wealth of opulent men, their vehicles and ornaments, shall not be divided (a); property, held in common, (would be) unemployed, for it cannot be given to one (in exclusion of another); therefore it must be divided by (some mode deduced from) reasoning (b); else it would be useless. By the sale of clothes and ornaments, on the recovery of a written debt, by compensating the dressed food with (an equal allotment of) undressed grain; an (equitable) partition is made. Water drawn from a (single) well or pool shall be taken by turns . . . . . A bridge and a field shall be shared (by co-heirs) in due proportion.” *Borradaile, May. Chap. IV. Sec. 7, para. 22* (*Stokes, H. L. B. 78*).

**REMARK.**—When it is said that the water of a well cannot be divided the meaning is that it cannot be distributed like land or

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(a) The translation of the second line ought to run thus :—

“They . . . . . have not considered, that the property of opulent men may consist of clothes and ornaments and such property.”

(b) *Yuktyā*, “by (some mode deduced from) reasoning,” may be better translated, “according to (the rules of) equity.”

money. But the ownership admits of a mental division, to which effect is given by an agreement to use the (physically) undivided thing in turns, and if the terms of the partition in this case were that each brother should take the water by turn for the irrigation of particular fields, each acquired a distinct property transferable along with that in the fields to be irrigated (as thus only could it be made available), and saleable in execution of a decree along with the fields themselves. As to the needlessness of a partition in specie to constitute separate property, &c., see the Introduction, pp. 683 ss.

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**Q. 4.**—Certain brothers divided all their property excepting a well, a privy, and a compound. It appears that no partition can be made in regard to the former two, but that the latter may be divided, though not without inconvenience, by building up a wall in the middle. The question is, whether or not it should be divided?

**A.**—It is not necessary to divide a well, a privy, and a compound. There are rules which forbid the division of such property.—*Poona, July 18th, 1851.*

**AUTHORITIES.**—See the preceding Question and Q. 1; Vyav. May. p. 125, l. 5; Stokes, H. L. B. 87.

**REMARKS.**—1. A compound may be divided under ordinary circumstances. If, however, in this case, the ‘inconvenience’ arising from its division would be of such a nature as to diminish or impair the rights of one of the co-heirs, i. e. prevent his using the compound for its intended purposes, then it must be used by all in common.

2. This, as all similar cases, must be decided according to the rules of equity.

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## SECTION 2.—DISPOSAL OF PROPERTY DISCOVERED AFTER PARTITION.

**Q. 1.**—A hoard of treasure was discovered in an ancestral house which was pulled down. The treasure was not divided between the cousins twice removed. The cousins had become separate 40 years ago, when the house was assigned to one of them as a part of his share. The hoard was

found in this house, and the question is whether the other cousin should have a share of it?

A.—Whenever any ancestral property is discovered, it should be divided. The treasure should therefore be divided.

*Poona, July 14th, 1855.*

AUTHORITY.—Vyav. May. p. 129, l. 1 :—

“Manu : When any common property whatever is brought to light after partition has been effected, that is not considered a (fair) partition ; it must even be made again.” (Borradaile, May. Chap. IV. Sec. 7, para. 26 ; Stokes, H. L. B. 79.)

REMARKS.—1. The answer is right, supposing it can be proved that the treasure was concealed by an ancestor of the now divided claimants. As to the disposal of treasure trove in general, *see* Vyav. May. Chap. VII. para. 10 (a) ; Yājñavalkya, I. 34, 35 ; Nārada, Pt. II. Chap. VI. paras. 6-8. Buried or sunk property belongs to the Government, which should allot one-sixth to the finder. Property found in the road is to be returned to the owner, less one-sixth for the Government, of which one-fourth should be given to the finder. Omission to inform is punishable by fine.(b)

2. For the present law *see* the Treasure Trove Act, VI. of 1878.

Q. 2.—There are three brothers. One of them claims a share of certain immoveable property on the ground that it was not divided along with the rest. The other brothers do not prove that the property was divided. How should the question be decided ?

A.—If the fact of the division be in dispute, the whole of the property may be redivided. If the fact of the division of a part of the property is agreed to, the undivided portion only may be divided.—*Rutnagherry, March 6th, 1856.*

AUTHORITIES.—(1) Vyav. May. p. 129, l. 1 ; (2) p. 128, l. 2 ; (3) p. 133, l. 1.

REMARK.—*See* the preceding question and the Introduction, p. 695 ss. The first proposition in the Śāstri's answer is laid down much

(a) Stokes, H. L. B. 131. *See* Steele, L. C. p. 60.

(b) Q. 64 MS, Surat, June 15th, 1845.



too broadly. A mere dispute will not entitle any separated member to claim a repartition. (a)

Q. 3.—Each of the members of a family received his share of a Vṛitti, (b) which was divided amongst them. The actual extent of the land, however, was subsequently found to be in excess of that taken as the basis of the partition. Should the excess be divided among the sharers ?

A.—Any new property discovered after the partition of the known property of a family should be divided among the sharers.—*Dharwar, February 16th, 1852.*

AUTHORITIES.—(1) Vyav. May. p. 90, l. 2; (2) p. 90, l. 6; (3) p. 128, l. 2; (4) p. 129, l. 1 (*see* Bk. II. Chap. III. Sec. 2, Q. 1).

Q. 4.—A man had three sons. The eldest of them gave a writing to his father, engaging that he would not commit any fraud in regard to the money and jewels given by him to his mother. The property was estimated at Rs. 3,000. The father is now dead and the eldest son has run away. Property valued at 1,200 Rupees only has been discovered. The second son is in league with the eldest. The third son is a minor. Their mother claims the whole of the property which has been discovered on the ground that her husband gave it to her. The question is, how should the property now discovered and that which may hereafter be discovered be divided ?

A.—It is illegal for a man to give his whole property to his wife in disregard of the claims of his sons. (c) The property should therefore be divided into four shares, of which one should be allotted to the mother and three to the three sons.—*Poona, September 10th, 1853. (d)*

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(a) *See* Colebrooke, Dig. Bk. V. Chap. VI. Text 378.

(b) Land, or hereditary property, or office, which is the means of subsistence of a family. *See* above, p. 741.

(c) *See* above, pp. 207, 208.

(d) A similar answer was received from *Rutnagherry, October 27th, 1851.*

**AUTHORITIES.**—(1) *Mit. Vyav.* f. 69, p. 1, l. 4; (2) f. 51, p. 1, l. 7.

**REMARKS.**—1. If the property had been acquired by the father himself, he would, according to the ruling of *Gangabai v. Vamnaji*, (a) be at liberty to dispose of it at his pleasure, and, in this case, the donation to the widow would be legal, if it could be proved.

2. The Śāstri's opinion, that each of the sons is to have a share, even the eldest, who ran away, is not quite correct. For though, according to the *Mitāksharā* and the *Vīramitrodaya*, fraud practised by one of the co-sharers does not disqualify him from receiving a share, (b) still, it would seem that he ought to be held liable for any ascertained portion of the share which he might have made away with. Hence the absconded son ought not to receive a share of the Rs. 1,200, since the Rs. 1,800 which he must be supposed to have made away with, amounts to more than his own share.

3. The liability of the fraudulent coparcener to make good any ascertained portion of fraudulently concealed property is laid down explicitly. (c) The rule extends to fraudulent or unjustifiably extravagant expenditure during the state of union. (d)

4. In regard to the last point, it ought, however, to be borne in mind that a proportionately large expenditure on the part of one brother ought to be proved to have been clearly 'dishonest.' Otherwise it cannot be deducted from his share. The *Vīramitrodaya*, f. 220, p. 2, l. 5, says on this point :—

"In order to show that (one brother) ought not to say of the (other) 'He has consumed (too) much, whilst we were undivided,' and that the king ought not to allow (the others) to take (back) that which may have been consumed (in excess of his portion by one of them), the same (author *Kātyāyana*) says : 'He shall certainly not cause to be paid back property, which the brothers consumed, while living in union.' The bearing (of this text is) that enjoyment (of the common property) in unequal proportions cannot be forbidden, because it is unavoidable."

The same remark applies to the second son, if it can be proved that he really participated in the fraud.

(a) 2 Bom. H. C. R. 304.

(b) See *Introd.* pp. 679, 680.

(c) *Mit.* Chap. I. Sec. 9, paras. 1—3; Stokes, H. L. B. 404; *Mayūkha*, Chap. IV. Sec. 7, para. 24; Stokes, H. L. B. 79.

(d) See *Colebrooke*, Dig. Bk. V. Chap. VI. Text 373; Steele, L. C. 60, 217, 223.

The proper division of the recovered Rs. 1,200, therefore, seems to be one in equal shares between the mother and the minor son.

5. In regard to property in excess of the Rs. 1,200 that might be discovered afterwards, such property ought in the first instance to be used to make up the full shares of Rs. 750, to which the mother and the minor were originally entitled. Afterwards only, the rights of the two fraudulent coparceners can be taken into account. Members of an undivided Hindû family, making partition, are entitled as a rule not to an account of past transactions, but to a division of the family property actually existing. (a) In *Davlattrav v. Narayanrav* (b) it is ruled that the principle applies generally to a managing member. He is not in the absence of fraud or wanton extravagance to be made answerable for every item of expenditure, nor on the other hand to receive credit for family debts paid by him as an addition to his own share on a partition. See the Introduction, 'RIGHTS AND DUTIES ARISING ON PARTITION.'

6. The several members may, however, enter into agreements with each other for the expenditure on joint purposes of their separate property. (c) Such expenditure must of course be allowed for in a subsequent partition. (d)

### SECTION 3.—LEGALITY OF PARTITION.

Q. 1.—A father divided his property between his two sons. They then executed a deed of separation which continued to be respected for about 8 years. Afterwards the father executed a document in favour of one of his sons in the absence of the other, modifying the terms of the deed. Has the father authority to do so?

A.—It appears that certain property was first set apart for the maintenance of the father and mother, and the rest divided between the sons. The father cannot therefore modify the terms of the deed of separation without the consent of both his sons.—*Poona, September 15th, 1845.*

(a) *Lakshman Dada Naik v. Ramachandra Dada Naik*, I. L. R. 1 Bom. 561; above, p. 763.

(b) R. A. No. 5 of 1875; Bom. H. C. P. J. F. for 1877, p. 175.

(c) See *Muttusvami Gaundan et al v. Subbiramaniya et al*, 1 M. H. C. R. 311.

(d) See *Steele*, L. C. 217, 219.

**AUTHORITIES.**—(\*1) *Manu* IX. 47:—

“Once is the partition of an inheritance made; once is a damsel given in marriage; and once does a man say ‘I give’: these three are, by good men, done once for all (and invariably).”

“Kullūka’s gloss:—‘A partition of the wealth belonging to the father and others, which has been *made by brothers according to law*, is made once only, and cannot again be changed.’”

(\*2) *Vīramitrodaya*, f. 223, p. 2, l. 8:—

“But what has been said by *Manu*, ‘Once is the partition of an inheritance made,’ &c., that (applies to cases) where there is no ground for annulling that (partition).”

**REMARKS.**—1. The answer is right, if the first partition had been made in accordance with the law, that is, in due proportions, or by mutual assent. (a)

2. A fresh partition cannot be claimed, when, though the original division was equal, supervening circumstances have made the shares unequal in value. But if one of the divided coparceners has lost part of his share, through the wrongful act of another, he may recover damages. (b)

**Q. 2.**—A man possesses some houses and shops. Of these, all the shops and one house were given by him to his three sons, who live separate from him. The father has filed a suit for the recovery of the property in the possession of his sons. The property was acquired by the father himself. Can he claim it?

**A.**—No sooner is a son born than he acquires a right to his father’s property, (c) but if he wishes to have a share in his father’s property, he cannot have it unless his father is willing to give it to him. (d) If the father is very old or of

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(a) See the *Smr̥iti Chandrikā*, Chap. XIV. para. 7; Chap. XV. para. 4; *Mootoovengadachellāsamy v. Toombayasamy et al*, M. S. D. A. B. for 1849, p. 27; and *Govind Wisvanath v. Mahadajee Narayan*, 1 Bom. S. D. A. B. 167.

(b) *Rango Mairal v. Chinto Ganesh et al*, S. A. No. 297 of 1874; Bom. H. C. P. J. F. for 1876, p. 74.

(c) See above, p. 648.

(d) See above, pp. 657, 659.

a bad character, his son has a right to insist upon a division of his property, even though the father is unwilling.

*Dharwar, December 15th, 1853.*

**AUTHORITIES.**—(1) Vyav. May. p. 91, l. 2; (2) p. 91, l. 7; *see* the preceding case.

**REMARK.**—The Śāstri's answer is not to the point. If the father had really made a division, and if the division had been made according to the law, *i. e.* under the observance of the rules detailed above, or, with the consent of all parties, even against those rules, it stands good. As to the relation of the passage in the *Mitākshara* corresponding to that (a) quoted by the Śāstri (b) and Sec. 5 paras. 8, 11, (c) reference may be made to *Nāgalinga Mudali v. Subbiramaniya et al.*, (d) and to Bk. II. Chap. I. Sec. 2, Q. 2—8 *supra*, p. 825 ss.

**Q. 3.**—The common property of two brothers amounted to Rs. 30,000. One of them obtained a *Fārikhat* from the younger brother by offering him about Rs. 7,000 in full payment of his share. A part of it was paid, but in consequence of the non-payment of the rest, the younger brother filed a suit against his brother to oblige him to pay a moiety of the whole property. Is this in accordance with the Śāstras?

**A.**—When a person thinks himself able to acquire property or is otherwise unwilling to take his share, it is directed that a small portion should be given to him at the time of his separation. (e) It is also enjoined that the *Sirkar* should prevent the person whose claim has been thus compounded from making a further demand afterwards. The younger brother therefore can only claim what he agreed

(a) Borradaile, Vyav. May. Chap. IV. Sec. 4, para. 7; Stokes, H. L. B. 49.

(b) Coleb. Mit. Chap. I. Sec. 2, para. 7; Stokes, H. L. B. 378.

(c) Stokes, H. L. B. 60, 62.

(d) 1 M. H. C. R. 77.

(e) *See* Steele, L. C. 58, 214.

to receive at the time of writing the Fārikhat. His claim to a moiety is not proper.—*Tanna, July 28th, 1849.* (a)

AUTHORITIES.—(1) Vyav. May. p. 134, l. 1:—

“The same author, with reference to one separated by his own wish, and afterwards disputing, says: If he subsequently dispute a distribution, which was made with his own consent, he shall be compelled by the king to abide by his share, or be amerced if he persist in contention.” (Borradaile, May. Chap. IV. Sec. 7, para. 38; Stokes, H. L. B. 83.)

(\*2) Mit. Vyav. f. 52, p. 1, l. 13:—

“Something is here added respecting the residue of a general distribution of the estate. (b)

“Effects which have been withheld by one co-heir from another, and which are discovered after the separation, let them again divide in equal shares: this is a settled rule.” (Colebrooke, Mit. Chap. I. Sec. 9, para. 1; Stokes, H. L. B. 404.)

REMARK.—The Śāstri's answer is not quite to the point. If the younger brother agreed, knowing or having the means of knowing the facts, to an unequal division, then it holds good (Auth. 1). If he was induced to consent to it by fraudulent representations, then he is not bound by his agreement (Auth. 2.) (c)

Q. 4.—Four brothers divided their interests. The share of a certain piece of land which one of them received was attached by Government. He therefore claims a new share of the land in possession of his brothers. Can he do so?

A.—No.—*Dharwar, April 11th, 1849.*

AUTHORITY.—Manu IX. 47 (see Bk. II. Chap. III. Sec. 3, Q. 1).

REMARK.—The Śāstri's answer is right only on the supposition that no fraud was committed in making the division, and that the claim for which the land was attached, was not an old unsettled claim against the family estate. For, as regards the first point, ‘fraud in

(a) A similar answer was received from Khandesh, *February 17th, 1854.*

(b) The translation of the first sentence ought to run as follows:—

“Now something is declared which is a supplementary (rule to be observed) at all Partitions.”

(c) See also Introd. § 4 r, pp. 702, ss.

Hindû Law vitiates every transaction.' (a) As to the second point, if there was an old claim against the family estate which, on partition, had not been taken into account, and for which the portion of one brother was afterwards attached, it would seem that the latter would have a right to claim compensation from the others. For 'a partition made according to the law,' to which alone the authority quoted by the Śāstri refers, presupposes an equal division of the family debts. (b) It seems not improbable that by "attached" is meant 'resumed,' that is reduced from 'Inām' or rent-free land to 'khālsāt,' 'paying revenue,' to the entire exclusion of the former Ināmdār if the land was held by an hereditary cultivator. In this case the same rule would apply.

Q. 5.—Certain brothers wrote a memorandum regarding their separation. Afterwards they remained together for a year and then divided their property. The question, therefore, is whether the separation should be considered to have taken place from the date of the memorandum, or from the date of the actual separation? and should expense incurred during the year be set to the account of the family, or should each man's expenses be laid upon him individually?

A.—The brothers should be considered united in interests so long as they take their meals together. The expense during the year should therefore be set to the account of the family. If any one should have expended any money on his own private account, it should be charged to him alone. The separation should be considered to have taken place from the date on which they actually divided the property and began to perform "Naivedya" (food-offering to gods) and "Vaiśvadeva" (the burnt-offering to fire) ceremonies separately.—*Sadr Adālat, May 21st, 1833.*

AUTHORITY.—Vyav. May. p 89, l. 8:—'Even when there is a total failure of common property, a partition may also be made by the mere declaration, "I am separate from thee." A partition may even be a mere mental distinction. This exposition clearly distinguishes

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(a) Introd. § 4 r, Remark.

(b) See Introd. § 7 n. 1.

the various qualities of this [term]. (a) Borradaile, May. Chap. IV. Sec. 3, para. 2; Stokes, H. L. B. 47.

REMARKS.—1. The Śāstri's view seems to be, that the memorandum has no value, because it was not carried out.

2. But partition is primarily a mental act. If the brothers therefore agreed on a partition and drew up a document setting forth the division of their estate, this act constitutes a partition, and it is unnecessary to carry it out by a physical distribution of the property. They must be considered divided from the time at which the writing was signed. If afterwards, a year elapsed before the intentions declared in the writing were carried out, the expenses must be divided in due proportion, and be paid by each brother out of his share. (b) In many of the older cases separate possession was held essential to constitute a binding partition. (c) At Bombay it was held that a deed of partition must have been acted on. (d) These cases show that the Śāstri's view has been extensively held, but see now *Appovier v. Rama Subba Aiyar et al.* (e) A partnership in receipts and expenditure sometimes follows a dissolution of the status of a united family. Steele, L. C. 214.

Q. 6.—One brother passed a Fārikhat to another, but it was not carried out for a long time. One of the brothers and his son died. The question is whether the widow of the deceased can get her husband's share as specified in the Fārikhat?

A.—Yes, she can.—*Tanna, October 15th, 1858.*

(a) The translation of the last lines ought to run thus :—'For partition is merely a particular kind of intention. The declaration "I am separate from thee" indicates this.'

(b) See *Intro. § 4 D. I.*, p. 681.

In England when two tenants in common agreed to a partition and acted on the agreement, but did not execute a deed, the devisees of one of them were held answerable for the costs of carrying out the partition under which the devise to them took effect. *In re Tann*, L. R. 7 Eq. Ca. 434.

(c) *Naggappa Nynair v. Mudundee Swora Nyair*, M. S. D. A. R. for 1853, p. 125; *Subba Naiken v. Tangaparoomal*, *ibid.* for 1859, p. 11; *Kuppammal v. Panchanadaian*, *ibid.* for 1859, p. 260.

(d) *Gokuldas v. Hurgovindas*, 3 S. D. A. R. 236.

(e) 11 M. I. A. 75. See above, p. 685.



**AUTHORITIES.**—(1) Vyav. May. p. 134, l. 4; (2) p. 136, l. 4.

**REMARKS.**—1. The Śāstri's authorities refer only to the right of a widow to inherit her 'separated' husband's property.

2. For authorities see the preceding Question and Intro. § 4 D, pp. 680 ss. A suit for partition, however, conveys no right to the coparcener's widow, (a) and at Madras it has been ruled that even a decree, if not executed, will not have this effect. (b) Compare the Vyavasthā at p. 175 of the report with the rule enunciated in *Bany Pudmavati v. B. Doolar Singh et al*, (c) and *Rewun Persad v. Musst. Radha Beeby*. (d)

**Q. 7.**—Three persons drew up a memorandum regarding the division of their family property. Each received his share of everything except the Vṛitti, which was left under the management of one person acting on behalf of all the co-sharers. Afterwards when the adopted grandson of a deceased co-sharer was on the point of death, the sharers framed a memorandum in triplicate, setting forth the division of the Vṛitti. The original memorandum was duly signed, and attested by the sharers, but before the duplicate and triplicate could be signed, the man on the point of death expired. Can his widow under such circumstances claim a share of the Vṛitti?

**A.**—If a share of the Vṛitti has been assigned to the adopted grandson, his widow, who has no son, can claim it. If a share has not been assigned to the husband, the widow cannot claim it. It is for the Court to determine whether the incompleteness of the duplicate and triplicate of the memo-

(a) *Bhuggaji v. Bhaggawoo et al*, Sp. App. 691 of 1865.

(b) *Govinda Oodian v. Alamaloo*, M. S. D. A. R. for 1855, p. 157; *Babaji Parsharam v. Rāmchandra Anant*, I. L. R. 4 Bom. 157, and as to a decree under appeal, *Sakharam Mahadev v. Hari Krishna*, I. L. R. 6 Bom. 113.

(c) 4 M. I. A. 259.

(d) 4 M. I. A. 137, and see the cases referred to above, and *Suraj Bunsee Koer v. Sheo Prasad*, L. R. 6 I. A. at p. 103, and *Chidambaram Chettiar v. Gauri Nachiar*, I. L. R. 2 Mad. 83, S. C., L. R. 6 I. A. 177.

random of division leads to the supposition that a partition of the *Vṛitti* was not made.—*Tanna, January 19th, 1859.*

Authority not quoted.

REMARKS.—1. See the preceding Question, and *Intro.* § 4 D, p. 682; § 4 E, pp. 698 ss.

2. No doubt is expressed as to the partibility of the *vṛitti*. See above, p. 730.

Q. 8—There were five brothers who divided their father's moveable property into five shares, each of them taking one. The immoveable property was left for the maintenance of the father, with an agreement that, after his death, it also should be equally divided among them. One of the brothers subsequently died; and his death was followed by that of his father. The widow of the former claims one-fifth of the immoveable property as the share of her husband. Is this claim right?

A.—As the family is divided, the widow is entitled to the share which was assigned to her husband.

*Dharwar, December 31st, 1847. (a)*

AUTHORITIES.—(1) *Vyav.* May. p. 90, l. 1; (2) p. 134, l. 4.

REMARK.—The widow cannot claim any portion of undivided family property (*Intro.* § 4 E.), but if there was an agreement amongst the co-parceners that the property should be divided amongst them in definite shares, subject only to the father's enjoyment for life of the whole, it would appear that the Courts would regard this as a partition conferring a right of inheritance on the widow. (b)

#### SECTION 4.—PARTIAL DIVISION.

Q. 1.—One of three brothers desires to have a share of his father's house without insisting on the division of the whole property. Can he do so?

(a) A similar answer was received from *Khandesh, September 26th, 1857.*

(b) *Rewun Persad v. Musst. Radha Beeby*, 4 M. I. A. 137. See *Intro.* § 4 D. 1, pp. 681 ss, and Remark 2 under Q. 6.

A.—The Sâstra allows sons to take equal shares of their father's property, but there is nothing to prevent one of them from demanding the share of any particular portion of such property.—*Dharwar, January 28th, 1848. (a)*

AUTHORITY.—Mit. Vyav. f. 47, p. 2, l. 13.

REMARK.—The partial division may take place by consent, but the brother cannot insist on it. (b) The same principle was subsequently affirmed in *Ragvindrappa v. Soobappa. (c)*

Q. 2.—Certain members of a divided family of the Kunabi caste lived together again as a family united in interest, and held their ancestral estate in common. They afterwards separated leaving some property undivided in possession of one of them. After some time, the other members claimed a share of the undivided property. Can the exclusive enjoyment of the property by one member of the family be a bar to the claims of the other members?

A.—If the members of a divided family become united in interests and again separate themselves from each other, they are still entitled to a share of the common property; (d) even though it may, on their second separation, have remained in possession of one of them.

*Ahmednuggur, July 19th, 1847.*

AUTHORITIES.—(1) Mit. Vyav. f. 45, p. 1, l. 5; (2) f. 40, p. 1, l. 4; (3) f. 49, p. 1, l. 10; (4) Vyav. May. p. 143, l. 2; (5) p. 128, l. 1; (6) p. 128, l. 3; (7) p. 128, l. 5; (8) Manu, Chap. X. verse 105.

(a) A similar answer was received from *Sholapoor, September 28th, 1849.*

(b) See *Dadjee Deorao v. Wittul Deorao*, Bom. Sel. Ca. p. 175. A partial partition is obviously only an accommodation not strictly consistent with the principle by which members of a family must be either united or severed in their sacra, and the estate that accompanies them.

(c) S. A. No. 3948, 27th Sept. 1858. See also *Introd. § 4 E, p. 698.*

(d) See above, pp. 141, 143; Steele, L. C. 214.

REMARK.—As there are no particular provisions in the law-books regarding a partial division, it is impossible to prove the correctness of the Śāstri's view by any explicit passages. Still it appears to be founded on the reason of the law. (a)

Q. 3.—There are two claimants to a Vatan. One of them has had the management of it for a long time. Can the one who has not the management claim a share in the emoluments?

A.—All the descendants of the person who acquired the Vatan have a right to a share of it. There is nothing in the Śāstras which prevents a descendant from claiming his share, because he does not manage the affairs of the Vatan.

*Ahmednuggur, March 1st, 1851.*

AUTHORITIES.—(1) Vīramit. f. 175, p. 2, l. 6; (2) Mit. Vyav. f. 50; p. 1, l. 7; (3) Vyav. May. p. 94, l. 3.

REMARK.—See Bom. Act III. of 1874, and the note below. (b)

(a) See Intro. § 4 E, pp. 698 ss.

(b) The Śāstri regards the Vatan (service holding) merely as a private estate with a certain obligation attached to it as a whole, not affecting the rights of the coparceners *inter se*. For the Regulation law on the subject, see Reg. XVI. of 1827, Section 20, and the cases quoted under it in the Bombay Acts and Regulations. Different views have been held at different times as to the nature of this kind of property. The opinion of the Hon. Mountstuart Elphinstone appears, from some MS. notes collected by one of the Editors, to have been very nearly that of the Śāstri, and the estate is not resumable on a mere discontinuance of the service, see *Jaggivandas Javerdas v. Imdad Ali*, I. L. R. 6 Bom. 211, and the cases there referred to. The late Sadr Court of Bombay at one time held that the mortgage prior to 1827 of a Vatan was valid, but only for the life-time of the Vatan-dār mortgagor, *Baee Rutton v. Mansooram*, Bom. S. D. A. R. for 1848, p. 93. By subsequent decisions it was ruled that mortgages prior to the passing of Reg. XVI. were not to be subjected to the rule there laid down, *Sukaram Govind et al v. Shreeneewas Row et al*, 2 Bom. S. D. A. R. 26; *Hureebhaee Soonderjee*, 2 *ibid.* 29; *Rachapa v. Amingaoda*, S. A. No. 807 of 1874, Bom. H. C. P. J. F. for 1875, p. 269; *Narayan Govind v. Sarjiapa*, R. A. No. 4 of 1874, *ibid.* for 1875, p. 99, wherein it was held that alienation prior to Reg. XVI. of 1827, coupled with long acquiescence, was good. After *Sukaram*

Q. 4.—A woman has brought an action against her brother-in-law for the recovery of her son's share of property. She urges that during the lifetime of her son, some of the family property was divided, but that it is for a share of the remainder that she now sues.

A.—She cannot claim any share, unless on the ground of some special agreement entered into by the parties when the division first took place.—*Dharwar, March 1st, 1849.*

AUTHORITY.—Vyav. May. p. 89, l. 6.

REMARK.—See Introd. § 4 E, Remark. The Śāstri, probably, means to say that the mother can claim her son's property only if an agreement to divide had been made during his life-time.

*Govind et al. v. Shreeneewas Row et al.*, quoted above, it was held that a Vatan was permanently alienable, *Sobharam v. Sumbhooram*, 3 Bom. S. D. A. R. 242; *Jesing Bhaee et al. v. Baes Jestawowoo*, 2 *ibid.* 131, except as regards the portion set aside under Act XI. Sec. 13, of 1843, for the office-holder, *Yeshwantraw v. Mulharrao*, *ibid.* 244. But in the end the doctrine adopted was that a sale was invalid even as to the vendor's life-interest, *Ramachander Nursew v. Krishnaji*, S. A. No. 2830, decided in 1852.

The Courts will distribute the surplus produce of a Vatan, though it cannot leave the family, *Jewajee v. Shamroy*, Morris, Part II. p. 110; *Mulkojee v. Baloojee*, Morris, Part III. p. 111. See now Bk. I. Chap. I. Sec. 2, Q. 5 note (a), p. 342, and the following cases:—*The Collector of Madura v. Mootoo Ramalinga*, 12 M. I. A. 438; *Krishnarav v. Rang Rao et al.*, 4 Bom. H. C. R. 1 A. C. J.; *The Government of Bombay v. Damodhur Parmanandds et al.*, 5 *ibid.* 203 A. C. J. The limitation of a Vatan-dār's estate by Reg. XVI. of 1827, Sec. 20, is not extended by Bom. Act III. of 1874, see *Jaggiwandās Jawer-dās v. Imdad Ali*, 1 L. R. 6 Bom. 211. For the analogous case of Ghatwali estates in Bengal see *Raja Nilmony Sing v. Bakranath Sing*, L. R. 9 I. A. 104, and the cases there referred to.

A Vatan may be compared with a fief under the feudal law to a man and his heirs which "the ancestor and his heirs equally as a succession of usufructuaries, each of whom, during his life, enjoyed the beneficial, but none of whom possessed or could lawfully dispose of the direct or absolute dominion of the property," Co. Lit. 191 a, Butler's note, which absolute dominion however as opposed to the *dominium utile* belonged in England only to the Sovereign, Bl. Com. Vol. II. Chap. IV.

Q. 5.—*A*, a man of the Śūdra caste, separated himself from his brother *B*, but left the family Vatan undivided. A few years afterwards *A* died, leaving his widow *C* pregnant. Should *C* be considered as the heir of *A*, from the date of *A*'s death until her delivery, and is she during this period competent to recover from her brother-in-law *B* her husband *A*'s share of the Vatan? If *C* be delivered of a son, will *C* and her son be entitled to separate shares of the Vatan?

*A.*—On the death of a man who has separated himself from his family, his son or adopted son is his heir and is entitled to inherit his property. If he leave no son, his widow, daughter, and other relatives in the order of precedence laid down in the Śāstras, inherit his property. If a brother who has not separated from the family die, leaving a pregnant widow, the division of the family property should be deferred till she be delivered. If a son be born, though his father is dead, he should be allowed the share to which his father would have been entitled. Though a grandson be supported from the proceeds of his grandfather's property, his claim to recover a share from his uncle, or his uncle's son, is in no way prejudiced. If at the time of the division of the family any property may have been concealed, it should be divided whenever it is discovered. In the case stated in the question, *C*, while pregnant, is *A*'s heir. If she bring forth a son he becomes his father's heir, and as such is entitled to recover his father's share of all the moveable and immoveable property of the family. From the date of her son's birth, *C* is no longer entitled to claim *A*'s share of the property.—*Tanna, June 26th, 1848.*

**AUTHORITIES.**—(1) Mit. Vyav. f. 55, p. 2, l. 1; (2) f. 51, p. 1, l. 1; (3) f. 50, p. 1, l. 1; (4) f. 52, p. 1, l. 13; (5) Vyav. May. p. 96, l. 3.

**REMARK.**—See the preceding cases, and Introd. § 4 *z*. Regarding the rule of deferring a partition until the delivery of a coparcener's pregnant widow, see Introd. § 4 *B*. 1, p. 657.

## CHAPTER IV.

## EVIDENCE OF PARTITION.

**Q. 1.**—Can the separation of a family be held to have taken place when there is no documentary evidence to prove it ?

**A.**—A *Fārikhat* or written instrument attested by the members of the family is the necessary proof of separation.

*Ahmednuggur*, 1845.

**AUTHORITY.**—Vyav. May. p. 132, l. 8 :—

“Those, by whom such matters are publicly transacted with their co-heirs, may be known to be separate even without written evidence.” (Borradaile, *Mayūkha*, Chap. IV. Sec. 7, para. 34; Stokes, H. L. B. 82.)

**REMARK.**—A ‘*Fārikhat*’ is not necessary in order to prove a division. (a) The doctrine enunciated by the *Śāstri* was adopted by the Sadr Court in some of the older cases, as in *Oomedchund v. Gungadhur*. (b) But in *Sukaram v. Ramdas*, (c) and *Kaseeshet et al v. Nagshet*, (d) this rule was abandoned, and now it is clear that partition may be proved like any other fact. (e)

**Q. 2.**—A man had two wives. The elder has one son, and the younger has four sons. The man divided his property into five shares, assigning one to each of his sons. The son of the elder wife executed a writing to the other four to the effect that he would never interfere in any

(a) According to the customary law a *farikhat* or deed of partition is thought indispensable in a few castes. In others it is not used. But in a vast majority it is general though its place may be supplied by the testimony of eye-witnesses of an actual physical distribution of the property. Steele, L. C. p. 402. See above, Bk. II. *Introd.* Sec. 4 D, p. 681. As to the common form of a deed of partition, see 2 Str. H. L. 389.

(b) 3 S. D. A. R. 108.

(c) 1 *ibid.* 22.

(d) 4 *ibid.* 100.

(e) See Coleb. Dig. Bk. V. Chap. VI. T. 381, 384; Bk. II. *Introd.* § 4 D. 1, p. 681; and Bk. I. Chap. II. Sec. 6A, Q. 31, p. 409.

matter concerning them, and that they were at liberty to settle among themselves any questions respecting their affairs. After this one of the four brothers died without issue. Subsequently the son of the elder widow, having received some produce of a field, offered three-fifths to the three surviving brothers. They assert their right to four-fifths. How is this question to be decided?

A.—The three full brothers of the deceased are his heirs. The half-brother cannot claim to be his heir. It will rest with the Court to consider the weight and effect of the writing passed by the half-brother.

*Dharwar, April 24th, 1854.*

AUTHORITY.—Vyav. May. p. 134, l. 4.

REMARK.—The facts of the case seem to be these:—The father of the five brothers had effected a division, which, in part at least, was a so-called 'phalavibhāga' or division of produce. The eldest brother, who appears to have been the manager of the estate, left undivided *in specie*, had given to his younger brothers a document confirming the division. Afterwards, on the death of one of the younger brothers, he seems to have disputed the division, and appropriated that share of the produce of the undivided property which would have gone to the deceased half-brother. Under these circumstances the division would be proved by the document and by the receipt of separate shares by the brothers. As the brothers were divided, the full brothers inherit before the half-brother, however the case might have been had there been no division. See Bk. I. Introd. 'CO-PARCENERS,' p. 73.

If the brothers are to be considered as reunited, still the share of the one deceased would descend to his brother of the full blood. In no case could the eldest be entitled to two-fifths without a special agreement. See above, pp. 141, 763 ss; Steele, L. C. 56.

Q. 3.—Two uterine brothers prepare and take their meals separately. Is this practice a sufficient evidence of the separation?

A.—When two brothers perform the śrāddha of their father separately, and when they have separate trade and



separate means of maintenance, they may be considered separated, and in this case no documentary evidence is necessary. (a) A verbal declaration of separation is also sufficient evidence in case the brothers have no property which they can divide.—*Surat, September 4th, 1845.*

**AUTHORITY.**—\* Vyav. May. p. 133, l. 2 :—

“Nārada declares also other signs of partition : Separated, but not unseparated, brethren, may reciprocally bear testimony, become sureties, bestow gifts, and accept presents. Gift and acceptance, cattle and grain, houses, land, and attendants, must be considered as distinct among separated brethren, as also the rules of gift, income, and expenditure. Those, by whom such matters are publicly transacted with their co-heirs, may be known to be separate even without written evidence.” (Borradaile, May. Chap. IV. Sec. 7, para. 34; Stokes, H. L. B. 82.)

**REMARK.**—See also Introd. § 4 D. 2, p. 688.

**Q. 4**—What are the signs of the separation of a father and a son? A father and a son of his younger wife live in one and the same house. The son of the elder wife has been living in a separate house for about 20 years. The property of the father has not been divided, nor has the elder wife's son received any share. He was in the habit of performing the sacrifice called 'Vaiśvadeva' (b) on his own account. Should he be considered a separated member of the family and can any man whose food is cooked separately perform the ceremony, or is it a sign of separation. Since the death of the father the elder son has joined the family, and assuming the guardianship of his half-brothers, has got them married. Can the half-brothers claim a share of the property acquired by the elder brother during the time he was away from the family. Can the elder brother claim a share of the ancestral property?

(a) See 2 Str. H. L. 346; Steele, L. C. 56, 213.

(b) This ceremony is performed for the sanctification of food before dinner. See Steele, L. C. 56.

A.—Those members of a family, who individually perform the ceremonies of 'Vaiśvadeva' and 'Kuladharmā,' (a) and have signed a *Fārikhat*, may be considered separated. It does not appear from the *Śāstras* that the elder son of a person is obliged to perform the 'Vaiśvadeva' on his own account, although his father and half-brother are united in interests, and he himself lives and cooks his food separately in the same town without receiving the share of his ancestral property. A person may, however, perform the ceremony by the permission of his father. The *Śāstra* authorises the elder son of a man to take possession of the ancestral property, and protect his younger brother and mother. A son, who has not made use of his father's means and who has declared himself separate and has acquired property through his learning, enterprise, &c., is not under the obligation of allowing shares of his property to his brothers. They can claim shares of the ancestral property only.

*Ahmednuggur, April 13th, 1847.*

**AUTHORITIES.**—(1) *Vyav. May.* p. 129; l. 2; (2) p. 129; l. 4; (3) p. 133, l. 2; (4) *Mit. Vyav. f.* 25; p. 1, l. 9; (5) *Mit. Vyav. f.* 48, p. 2, l. 5:—

"That which had been acquired by the coparcener himself without any detriment to the goods of his father or mother; or which has been received by him from a friend or obtained by marriage, shall not appertain to the co-heirs of brethren." (Colebrooke, *Mit. Chap. I. Sec. 4, para. 2; Stokes, H. L. B. 384.*)

**REMARKS**—1. For a full enumeration of the signs of a partition, see *Introd. § 4 n. 2, pp. 687, &c.*

2. The *Śāstri* is right in not considering the separate performance of the 'Vaiśvadeva' as a certain sign of 'partition,' though it is enumerated in the *Smṛitis* among these signs. The general custom is in the present day, that even undivided coparceners, who take their meals separately, perform this ceremony, at least once every day, each for himself, because it is considered to purify the food. We subjoin a passage on this point from the *Dharmasindhu*, f. 90, p. 2, l. 3 and 6 (*Bombay lith. ed.*):—

(a) The ceremonial worship of the tutelary deity. Steele, *L. C. loc. cit.*

'Rice mixed with clarified butter should be offered in the sacred domestic fire, or in a common fire. The oblation (at the *Vaiśvadeva*) should be made in that fire, with which the food is cooked. . . . Bhattojidikshita declares that, if members of an undivided family prepare their food separately, the *Vaiśvadeva*-offering may be performed separately (in each household) or not.' (a)

Q. 5.—A man had three sons. They used to live and take their meals separately in a house which was their ancestral property. They all subsequently died. A son of one of them claims a moiety of the house from the son of the other. The defendant in this case takes no objection to the equal division of the house. The widow of the third brother has joined the plaintiff. The house, which is the ancestral acquisition of the family, appears to be undivided property. Should the above-mentioned claimants be allowed under these circumstances equal or different shares in it?

A.—Preparing food and taking meals separately by brothers is considered by the *Śāstras* to be a mark of separation. According to this rule the three brothers are duly separated. Each of them has an equal share in the property. The widow of one of them should be allowed one-third of the house as the share of her husband.

*Surat, November 29th, 1853.*

AUTHORITY.—*Vīramit. Dāyabhāga*, f. 223, p. 1, l. 12.

REMARKS.—1. 'Preparing food and taking meals separately' is by itself not a sufficient proof of separation. (b)

(a) See the remarks of Prof. Goldstücker (On the Deficiencies, &c., p. 34 ss) which are instructive, though captious. In the passage "amongst members of a united family, when they cook their food in common, a separate performance of the *Vaiśvadeva* is not allowed," read, "is not necessary." The passages at pages 39 and 42 show the correctness of the view presented in the text.

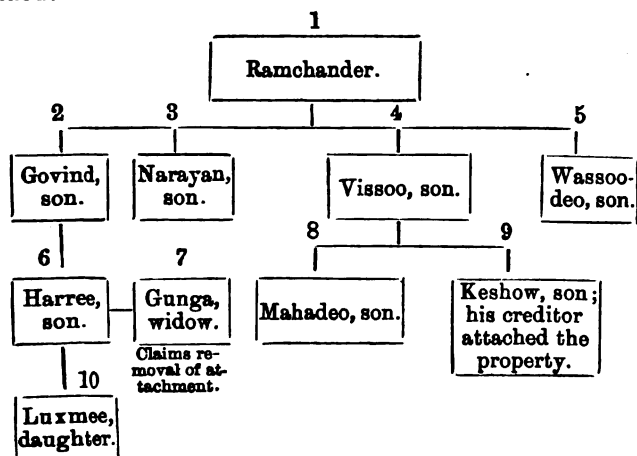
(b) It is an indication when the relatives occupy the same house, 2 Str. H. L. 397. Joint performance of ceremonies implies union of interests, 2 Str. H. L. 393. See Bk. II. Introd. § 4 D. 2 a, p. 687.

2. If the ancestral house was undivided, as stated in the question, the widow must be allowed the use of it and may establish a lien on it for her maintenance, but can in no case inherit it. (a)

Q. 6.—Four uterine brothers lived separately in a house belonging to their father. They had neither divided their property nor passed deeds of separation to each other. They, however, used to take their meals separately. Afterwards all of them died. The eldest of them has left a widowed daughter-in-law. She has a maiden daughter. Two sons of her father-in-law's brother are alive. (b) A creditor of one of them has attached the whole house. The widowed daughter-in-law has applied for the removal of the attachment from that portion of the house which constitutes her husband's share. The question therefore is, whether, according to the Śāstras, and by reason of the four brothers having lived separately, their property, excepting the house in dispute, should be considered as divided, and whether the daughter-in-law can claim a share of it?

(a) See above, p. 259; Bk. II. Introd, § 4 n. p. 698, and pp. 252, 753; Chap. II. Sec. 2, Q. 4, p. 826.

(b) The following genealogical table will be found to illustrate the question:—



**A.**—Although there is no documentary evidence to show that the brothers were separate, yet, as their places of living, meals, and business, were separate, they should be considered separated. Their property, including the house in which they lived, must also be considered divided. When any one, after the division of the property in which he has a share, is dead, his widow has a right to that share.

*Surat, December 16th, 1847.*

**AUTHORITIES.**—(1) Vyav. May. p. 129, l. 3; (2) p. 134, l. 8; (3) Vyav. May. p. 129, l. 2:—

“Yājñavalkya states the modes of decision in case of denial of partition made by any one: ‘When partition is denied, the fact of it may be ascertained by the evidence of kinsmen, relatives, and witnesses, and by written proof or by house or field’ (separately possessed).” Borradaile, May. Chap. IV. Sec. 7, para. 27; Stokes, H. L. B. 80. (a)

(4) Vyav. May. p. 132, l. 4:—

“Brihaspati:—They, who have their income, expenditure, and wealth distinct, and have mutual transactions of money-lending and traffic, are undoubtedly separate.” May. Chap. IV. Sec. 7, p. 34; Stokes, H. L. B. 82.

(5) Vyav. May. p. 134, l. 4:—

“Yājñavalkya thus relates the order of succession to the wealth of one (dying) separated and not reunited: The wife and the daughters also; both parents; brothers likewise and their sons; gentiles, cognates, a pupil and a fellow-student; on failure of the first among these, the next in order is indeed heir.” (Borradaile, May. Chap. IV. Sec. 8, para. 1; Stokes, H. L. B. 83).

**REMARK.**—The question states nothing about the brothers having carried on business separately. If the Śāstri is right as to this fact, his conclusions also would stand. (b) But the dining separately does not alone prove that the brothers were divided. If they were undivided the widow is entitled to residence and maintenance as a charge on the property. (c)

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(a) Nārada, Pt. II. Chap. XIII. Sl. 36, to the same effect, is quoted by the Mit. Chap. II. Sec. 12, para. 3; Stokes, H. L. B. 467.

(b) Bk. I. Chap. II. § 6A, Q. 31, *supra*, p. 409; 2 Str. H. L. 387, 397.

(c) *Rāmchandra Dikshīt v. Sāvitribāi*, 4 Bom. H. C. R. 73 A. C. J.

When the house of one member of the family was burnt down, and he then went to live in the same house with another, this was, it was held, to be referred rather to an exercise of a common right than an acceptance of mere hospitality, and the prior separate residence was not deemed sufficient proof of partition between the two. (g) But see also *Introd.* § 4 D. 2, p. 687 ss.

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**Q. 7.**—Two brothers have been separate for the last 15 years, but they did not pass a formal deed of separation. One of them has now filed a suit for a share of the land held on Mirâs tenure. The other has answered that there is some debt, and that the property should be divided along with the debt. How should this be decided?

**A.**—When a formal deed of separation is passed in the presence of the kinsmen of the parties concerned, and when each member is put in possession of his share of houses, lands, and other property, the family should be considered as separated. When the members merely live and take their dinner in separate places in the same village, they cannot be considered separated. The property as well as the debt should therefore be equally divided in the case referred to in the question.—*Ahmednuggur, April 28th, 1856.*

**AUTHORITY.**—Vyav. May. p. 129, l. 2 (*see the preceding Question, Auth. 1*).

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**Q. 8.**—The parties are not able to produce a deed of separation. It is, however, proved that the parties separated about 35 years ago, and that the deed of separation was then executed. Can the separation be considered established on other grounds than the production of the deed?

**A.**—As the evidence has proved that the separation took place, and that the parties concerned are in possession of their proper shares, the separation may be considered established. The production of the deed would have only strengthened the proof.—*Ahmednuggur, July 2nd, 1847.*

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(g) *Sheshapa et al v. Igapa et al*, R. A. No. 12 of 1873, Bom. H. C. P. J. F. for 1877, p. 37.

**AUTHORITIES.**—(1) Vyav. May. p. 129, l. 2. *see* Bk. II. Chap. IV. Q. 6, Auth. 3; (2) Vyav. May. p. 133, l. 2 (*see* *ibid.* Q. 3).

**REMARKS.**—*See* particularly Introd. § 4 D. 1, p. 680. In the case of *Bulakee Lall et al v. Musst. Indurputtee Kowur et al*, (a) it is laid down that any act or declaration showing an unequivocal intention on the part of a shareholder to hold and enjoy his own share separately, and to renounce all rights upon the shares of his co-parceners, constitutes, when accepted, a complete severance or partition.

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(a) 3 C. W. R. 41 C. R.

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BOOK III.

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ADOPTION.





## BOOK III.—ADOPTION.

### SECTION I.—SOURCES OF THE LAW.

In their opinions on the cases laid before them the Śāstris have in many instances referred to Adoption "made with the ceremonies of the Vedas and the Smritis." No precepts as to such ceremonies are to be found in the Vedic literature, and even in the Smritis the recognition of the 'son by gift' is but a part of a scheme in which he holds only a comparatively low place amongst the dozen varieties of substitutionary sons approved by those writings. They present few or no traces of the developed and elaborate system which has come down to our generation enriched and complicated by the inventive suggestions and the subtle controversies of a long series of lawyers, who were at the same time scholastics having unbounded confidence in the methods of a highly technical philosophy. (a) The fundamental notion indeed on which the institution was afterwards reared is found already in full possession of the Brāhmanical mind in the Vedic period. The manes were to be worshipped; the family was to be continued; the householder was to esteem his own being complete only when his home was furnished with a wife and son. (b) But other means than adoption supply the defects of nature: some further stages on the way to refinement have still to be passed before those means become discredited. In the meantime Adoption is but slightly glanced at. Its fitness for the needs of a people of the peculiar mental and spiritual character of the Hindûs was not at first perceived. Here therefore, even more than in other departments of the law, the Veda has, for the practical lawyer of the present day, but little importance as a direct source of the law. (c) For a complete history of the 'origins' of the

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(a) For the methods of interpretation and development brought to bear on the Vedas, see Whitney's Essays, 1st Series, pp. 108 ss.

(b) See Whitney's Essays, 1st Ser. pp. 50, 59; comp. Manu IX. 45.

(c) See above, p. 56.

subject the requisite researches have still to be made, the needful competence has still perhaps to be perfected. The modern edifice, though bearing every where the impress of the primitive religion and its early modifications, is planned in the main on ideas of a later time, the growth and variances of which can be gathered from the existing literature with at least an approach to confidence. (a)

In the long interval between the Veda and the Smritis more had been done towards systematizing than towards refining the theory of paternal and filial relations. The importance of maintaining the family is at the close of this period as strongly recognized as ever; the relations of the living to the dead had, through long meditation, become more vividly conceived than before. But the grossness of a barbarous time is not as yet cast off, nor have the ideas of the people settled down to any final appreciation of the several recognized modes of replenishing the family. Gautama, Baudhâyana and Vasishtâ, Manu and Yājñavalkya, Hârita, Vishnu and Nârada present their several lists. The order in which they rank the different substitutionary sons (b) will be discussed hereafter. That a substituted son is indispensable, failing one begotten, the *rishis* agree, with the exception of Âpastamba. (c) In him we have an echo perhaps of the then already ancient objection to the gift or acceptance of a child, an objection which later commentators found no great difficulty by means of distinctions and particular applications in explaining away. (d)

Another long break in the record follows the period of the Smritis. That a considerable development of the Hindû mind and character took place in the interval is manifest from the works in other departments which have come down to us. Poetry and philosophy awakened higher moral

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(a) Comp. Whitney, *op. cit.* pp. 62, 70.

(b) See Coleb. Dig. Bk. V. Chap. IV.

(c) Transl. p. 131.

(d) Comp. Datt. Mim. Sec. I. 36—47.

sensibilities, and the myths of the earlier times became enveloped in a mist of sacred association which softened their repulsive features and prevented their exercising an injurious influence. (a) The uncertain strivings of the nobler minds towards refinement and delicacy in the relations of the sexes and the constitution of the family were gradually in some measure realized by the Brāhmanical class, and those in close communication with them, while neither at any time quite lost such a hold of the primitive beliefs and conceptions of duty as served to bind the slow changes of their institutions together in historical continuity. When we come into clear light again we find a marked advance in purity of sentiment. Adoption has in a great measure supplanted the grosser institutions that once competed with it on more than equal terms. The archaic formulas are still preserved, but they have been subtly emptied of their former contents, or have become themes for mere academic disquisitions, which show the learning of the commentators and their tenderness for the sacred writings, but stand apart in a great measure from actual practice and the living law. The far-fetched explanations of the hard sayings which could not be set aside (b) show at once the reverential spirit of the commentators, and their resolution to mould even intractable materials to the uses and cravings of a society always in movement, and for centuries in a general movement forward, though not always on lines which led to the best conceivable results, or which entirely commend themselves to European sympathies formed under wholly different influences.

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(a) Comp. for the earlier period Gough's Phil. of the Upanishads, p. 17.

(b) On the reconciliation of discrepancies in the sacred writings and the application of reason to establish harmony, reference may be made to *Bhau Nanaji v. Sundrábdi*, 11 Bom. H. C. R. at pp. 265 ss. See too the Datt. Mim. Sec. II. 102, where reasoning, it is said, is to be applied to draw out an obvious inferential sense rather than separate revelations assumed for rules resting on one and the same principle.

From the time that Adoption comes upon the scene as an established section of the Hindû jural system, many authors have dealt with it either as the subject of separate treatises or along with the other leading topics of the law. (a) Besides the Vyav. May., which is the most frequently quoted, the Bombay Śâstris have referred to the Vîramitrodaya, the Saṁskâra Ganapati, to the "Saṁskâr" and "Datta" Kaustubha, to the Nirṇayasindhu and Dharmasindhu, the Dattaka Darpaṇa and the Dvaita Nirṇaya. (b) The doctrines drawn from these authorities are supported by citations from Manu and the other Smritis, as well as from the Mitâksharâ, and the Dâya Bhâga of Jîmûta Vâhana. These last are but infrequent. The Dattaka Mimâṁsâ and Dattaka Chandrikâ are hardly referred to at all. The opinions enunciated agree for the most part with the rules laid down in these treatises, but the remark of Rao Saheb V. N. Mandlik (c) seems to be substantially correct, that till quite recent years they were but little known and relied on in Western India. (d) It does not follow however that they are not valuable guides to the law. Though the law of Adoption has, in historical fact, grown up by a process of gradual adaptation, yet the Hindû commentators do not, any more than the English judges, ever set themselves up as makers of the law. They claim to be expositors, and if one of them develops principles in a way more consonant to the general ethical and jural system than another he naturally obtains the preference. (e) The congruousness of his doctrines with the whole mass of received notions is recognized, and they are re-

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(a) Many of these works are preserved amongst the learned in MS.

(b) The one intended is that of Shankara Bhaṭṭa, father of Nilkaṇṭha, author of the Mayûkha.

(c) Vyav. May. Introd. lxxii.

(d) That the Rao Saheb is a little too sweeping in his assertion may be seen by a reference to the opinions of the Poona Śâstris in *Haebutrao's* case, 2 Borr. R. at pp. 104, 105.

(e) See Coleb. Dig. Bk. II. Chap. IV. T. 15 Com. ; T. 17 ; Bk. V. T. 57, 424 Com.

ceived into the legal consciousness of the people as rules which, from their fitness, must be followed. (a) This fitness implies a due agreement with the traditions that have descended in slowly modified interpretations from the Vedic era, and forms a proper ground on Hindû principles for the acceptance into the common law of the particular phases of doctrine which come thus recommended. (b) This is more especially so if they are set forth with a clearness and point which makes them readily intelligible. It may seem that the *Dattaka Mīmāṃsā* and *Dattaka Chandrikā* have not any very strong claims on these grounds, but excellence is essentially comparative, and very high authorities have agreed in assigning to the *Dattaka Mīmāṃsā* the first place amongst the treatises on Adoption. Colebrooke says (c) that "the *Dattaka Mīmāṃsā* is no doubt the best treatise on Hindu Adoption." By this Sutherland was led to translate it: "The *Dattaka Mīmāṃsā*," he says (d) "is the most celebrated work extant on the Hindû law of Adoption." Of the *Dattaka Chandrikā* he says, "it is a work of authority." (e) In assigning it to Devāṇḍa Bhaṭṭa as its author he may probably have been mistaken, (f) but this does not affect his judgment as to its popular reception as a guide to the law. Sir M. Westropp, C. J., says of the *Dattaka Mīmāṃsā* that "though not quite invariably followed [it] is generally of high authority in this Presidency" (Bombay). (g) In Bengal the authority of both works stands still higher. It was said by Mitter, J., that "The *Dattaka Chandrikā* and the *Dattaka Mīmāṃsā* are undoubtedly entitled to be considered, and have always been considered, the highest authorities on the

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(a) Comp. Meyer, *Inst. Jud. Tom. V.* p. 7.

(b) See *Bhau Nanaji Utpat v. Sundrabai*, 11 Bom. H. C. R. 267.

(c) 2 Str. H. L. 133.

(d) Preface.

(e) *Ib.*

(f) See Rao Saheb V. N. Mandlik, *loc. cit.*

(g) In *Gopal N. Safray v. Hanmant G. Safray*, I. L. R. 3 Bom. at p. 277.

subject of Adoption." (a) But that their influence is not thus confined is plain from the description given by Sir W. Macnaghten, cited by the Privy Council in *The Collector of Madura's case*: (b) "Again of the *Dattaka Mimāṃsā* of Nāṇḍa Paṇḍita, and the *Dattaka Chandrikā* of Devāṇḍa Bhaṭṭa, two treatises on the particular subject of Adoption, Sir William Macnaghten says, that they are respected all over India; but that when they differ the doctrine of the latter is adhered to in Bengal and by the Southern jurists, while the former is held to be the infallible guide in the Provinces of Mithila and Benares."

As supplementary to the *Mitāksharā* and the *Mayūkha*, then, these may fairly be regarded as the principal authorities. The others referred to, though in some instances of importance, are not only less accessible, but on the whole less valuable when got at, and less suited to bringing about a general harmony of doctrines and decisions on a subject on which it is specially desirable that the law should be uniform and widely known. Still usage, the ultimate test, has in some instances decisively rejected the doctrines of these two works, as for instance in allowing adoption by a widow without express authority from her husband, (c) while Nāṇḍa Paṇḍita insists that *Vasishṭha's* text requiring the husband's assent prevents any adoption at all after his death. The *Śaṃskāra Kaustubha* (d) says that the assent of kinsmen cannot properly be withheld, and therefore the widow, who is competent and bound to perform this service for her husband, may act without their concurrence. The *Sāstris* in *Thukoo Bae Bhide v. Rama Bae Bhide* (e) deduced a like competence from the injunction of the *Mitāksharā*, "a woman must be restrained only from unnecessary or useless acts," and declared that the widow could adopt even against

(a) In *Rajendro Narain Lahoree v. Saroda Soondaree Dabee*, 15 C. W. R. 548.

(b) 12 M. I. A. at p. 437.

(c) See *Haebutrao Mankur's case*, 2 Bom. at pp. 104, 105.

(d) As to the authority of this work, see 2 Borr. R. *loc. cit.*

(e) 2 Borr. R. 488, 499.

the wishes of her husband's kinsmen. In a previous case<sup>(a)</sup> the Śāstris had quoted the *Mayūkha* to prove that the widow might indeed adopt without an express authority from her husband, but after "obtaining the sanction of the kinsmen and informing the ruling authorities." This they said "corresponds with the custom of the country." Yet should the widow have actually adopted a son with due ceremonies, such an adoption conformable to the Vedas could not "be set aside should the person opposing it be ever so near of kin." The Courts, as will be seen, have steered a middle course amongst the conflicting authorities. That they should have had to do so implies that none can be received as absolutely supreme.

In the present day it does not seem likely that the fountain heads of the law will be much drawn on for new principles in the Law of Adoption. They are indeed too meagre to afford such principles save through an elaborate process of constructive inference. To this they have been subjected by the Hindû writers for many centuries, and the rules deduced by these writers have in their turn been tried and sifted by express or tacit reference to the usages and the peculiarities of Hindû society, until those best suited to its needs have been ascertained and appropriated. The Smritis come nearer than the Veda to modern practice, but the most important authorities are the writers, such as have been referred to, whose expositions have partly embodied and partly fashioned the customary law. In the great case of *The Collector of Madura* <sup>(b)</sup> the chief authorities on the law touching a widow's power to adopt had been collected under the four heads of (1) Original Sanskrit texts, (2) Responses of Śāstris, (3) Opinions of European writers, and (4) Decisions of the Courts. The judgments, both in the first instance and in appeal, proceeded almost entirely on the third and the fourth

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(a) *Sree Brijbhokunjee Maharaj v. Sree Gokoolootsaojee Maharaj*.  
1 Borr. R. 202, 214.

(b) 12 M. I. A. 397, 411.



classes of authorities, and of the first the Judicial Committee speak as "a catena of texts, of which many have been taken from works little known and of doubtful authority. Their Lordships concur with the judges of the High Court in declining to allow any weight to these," while accepting those recognized by the chief European writers on Hindû law as of unquestionable authority in the South of India, where the case under appeal had arisen.

To the opinions of the Śâstris, which the High Court had denounced as having "polluted the administration of Hindû law," (a) their Lordships, as already observed, (b) attach considerable importance. Those opinions, they say, "which are consistent with [translated works of authority] should be accepted as evidence that the doctrine which they embody has not become obsolete, but is still received as part of the customary law of the country." (c)

In dealing with authorities the analogy of the rules accepted by kindred schools may greatly strengthen one of two or more inconsistent doctrines propounded by rival authors. (d) All rely on the same ancient texts, and the waves of philosophical or moral influence which have mould-

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(a) In *Collector of Madura v. Anandayi*, 2 Mad. H. C. R. at p. 223.

(b) Above, p. 2.

(c) *The Collector of Madura v. Moottoo Ramalinga Sathupathy*, 12 M. I. A. at p. 438, 439. The Śâstris vacillated occasionally in the opinions they delivered. On points of difficulty they naturally differed. When one considers the cobweb structure of the Hindû law laboriously spun out of a primitive theology by means of a philosophy having but little respect for mere practice, it was impossible that there should not be variances of opinion. One view was in itself as reasonable in many cases as the other. In some instances the Śâstris seem to have gone wholly wrong. The same may be said of jurists and judges everywhere. A reading of the Śâstris' responses, as wide as that on which the present work is founded, would convince any unprejudiced student that as Law Officers of the Courts these learned men performed their duties, save in very rare instances, with integrity as well as intelligence.

(d) *Ibid.*

ed the derived notions in one part of India have almost of necessity extended their effect to the neighbouring regions, aided in the case of the learned by their possession of a common language. Through the medium of Samskrit, ideas having in themselves a fitness for wide reception have been capable at all times of diffusion with something like the same striking celerity which obtained through the use of Latin in the Europe of four and five centuries ago.

The tendency of usage to conform to the received scripture standards has been noticed in the first part of this work. (a) Hindû theory justifies variances from the normal rule of conduct only by a supposition of some lost revelation (b) to which they may be referred, except in cases purposely left to individual discretion, (c) and the Śâstris assert the superiority of the Vedas to mere custom, (d) but when the precept is not decisive they allow custom to replace it. (e) The Charters of the High Courts and the Regulations of the Legislature give the next place in authority after the Statute law to usage, and however in learned speculation the sacred texts may be exalted above mere human practice there can be no doubt that the Hindû lawyers had arrived substantially at the same conclusion that the British Government has defined. The general force of custom as law is repeatedly asserted by Manu, (f) as by Kâtâyâna, Yājña-

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(a) See above, pp. 9, 425, 426. As to the determination of caste rules, see Sec. II. below.

(b) See 2 Muir's Sanskrit Texts, 165, and references below.

(c) Manu II. 12, 18; Gaut. XI. 20.

(d) 2 Borr. 488; see M. Müller, H. A. S. Lit. p. 53; Muir's Sanskrit Texts, Vol. III. pp. 179, 181; Coleb. Dig. Bk. I. T. 50 Comm.; Datt. Mīm. Sec. I. paras. 10, 11.

(e) Āpastamba, Transl. pp. 15, 55. At p. 47 is a caution against inferring the former existence of a Vedic passage from a usage which can be accounted for on merely utilitarian grounds, and a caution against following a usage with no higher justification.

(f) I. 108, 110; II. 12; IV. 178; VII. 203; VIII. 41, 42.

valkya, and the other great Rishis. (a) The Mitāksharā allows that custom has abolished Manu's rules for specific deductions and unequal shares in partition. (b) The Vyavahāra Mayūkha declares that the very practice given by Gautama as an example of one that usage could not establish, the marriage of a maternal uncle's daughter, is sanctioned by custom in the Dekhan. (c) Macnaghten instances the Kshetrāja as a legal subsidiary son still recognized by the local law of Orissa. (d) Mitramisra, following the Mitāksharā, says the conflicting texts respecting subsidiary sons are to be reconciled by referring them to different local customs. (e) On this principle the Sāstri, in a case amongst the Bhatele caste, declared that by the caste custom an adoption could not be allowed while male kinsmen survived to continue the family. (f) This agrees with the answers preserved in Borradaile's collection, and shows that custom well established is practically supreme. In the particular instance, which is not a solitary one, it may well be that the custom embodies a rule against adoption, which once existed in some sacred writings as Āpastamba indicates, but has faded away in the transcriptions of later centuries.

The importance of custom as a source and standard of the law is specially great in the case of adoption, because this being of comparatively modern development the Vedic texts, written without respect to it, admit of manipulation very much according to the desires of the interpreters. The Smritis even are far from regarding adoption in the light in which it is now viewed. Thus, though the Śruti and Smṛiti

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(a) See the quotations in *Rawat Urjun v. Sing Rawat Ghunsiam Sing*, 5 M. I. A. 180.

(b) Mit. Chap. I. Sec. 3, para. 4.

(c) Vyav. May. Chap. I. Sec. 1, para. 13.

(d) Macn. H. L. 102.

(e) Vīram. Transl. p. 127; Macn. H. L. 188.

(f) MS. 405, Surat, 14th June 1847.

are to the pious Hindû above all reasoning, (a) and a rationalist ranks as an atheist, (b) yet Vijñāneśvara, who raises the sacred code above all rules of ethics, has still to admit an adjustment by reference to the general and particular and other modes of interpretation, (c) and custom and approved usage (d) govern the received construction of the texts in proportion as these are in themselves indecisive and incapable of direct application. (e) This does not exclude a comparison of the relative weight of those who pronounce on the customary law. Superior knowledge is to be recognized in some men, of local usages and of tradition (f); they in fact are the depositaries of custom, as it is gradually organized, (g) and reproduce it in its living forms. (h) It was a consciousness of this which moved the Bombay Government of the early part of the present century to set on foot the inquiries

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(a) Manu II. 10; comp. *ib.* XII. 105.

(b) Manu II. 11; see Smṛiti Chandr. Chap. III. para. 21; Manu XII. 106.

(c) See Yājñ. II. 21; Vyav. May. Chap. I. pl. 112; Coleb. Dig. Bk. II. Chap. IV. T. 15 Com.; Bk. V. T. 332 Com.; Comp. Goldstücker, *op. cit.* p. 2; 2 Muir's Sanskrit Texts, 169, 177, 200.

(d) Judicial Committee in *Bhya Ram Singh v. Bhaya Ugur Singh*, 13 M. I. A. 390.

(e) Vijñ. in Roer and Montrieu's Yājñ. p. 8; Manu I. 110; IV. 155. He goes so far as to say that precepts are not to be followed in a practice that has become repulsive to the community, as for instance, by raising up seed to a man deceased, and by sacrificing a cow, though these are commended by the Hindû scriptures; Mit. Ch. I. Sec. III. para. 4. But Devāṇḍha Bhaṭṭa censures this looseness of doctrine, and quotes Vasishṭha (I. 17) to prove that usage is of authority only where it is not opposed to the Vedas and Śāstras, Smṛi. Chand. Ch. III. p. 21 ss. See Gaut. XI. 20; Baudh. Pr. Adh. 1, Kaṇḍ. 2, paras. 1-7; Manu VIII. 41; VII. 203.

(f) 2 Muir's S. Texts, 173.

(g) See Savigny, System, Vol. I. § 12; Goudsm. Pand. Bk. I, § 15, and notes.

(h) Comp. Savigny, System, Vol. I. §§ 7, 8, 29, 30; Puchta Gewohnheitsrecht, Vol. I. p. 162 ss.

conducted by Steele, and Borradaile. The information gathered by the former on adoption is embodied in his *Law of Caste*. The answers collected by the latter have not been all preserved, but in English and Gujarâti a considerable body remain. (a) These were obtained from the representative members of the several castes. They were given, it is evident, with care and conscientiousness as well as knowledge. They have for other purposes been frequently referred to in the foregoing pages of this work, and they must be used as additional and valuable authorities on the *Law of Adoption*. (b)

It may be necessary to add that a particular custom which is relied on in any case as derogating from the common law, based itself on a more general custom, must be clearly proved (c) in this as in other departments of the law. (d) Of a general custom the Courts take notice without its being proved and without their attention being called to it. Works like the present may make the performance of this duty somewhat easier.

For the application of the law as ascertained from its various sources the Judicial Committee have laid down principles which must always constitute a great part of the science of the Courts. Thus in dealing with the Hindû law "Nothing from any foreign source should be introduced

(a) The Gujarâti collection is now in course of publication by Sir Mangaldas Nathubhai.

(b) As to the force of custom *see* further *Rama Lakshmi v. Shivanantha*, 14 M. I. A. 576; *Surendra Nath Roy v. Hiramani Barmani*, 1 Beng. L. R. 26 Pr. Co.; *Lala Joti Lal v. Mussamat Durani Kuar*, Beng. L. R. F. B. R. 67; *Court of Wards v. Pirthee Singh*, 21 C. W. R. 89 C. R.; *Bai Amrit v. Bai Manek*, 12 Bom. H. C. R. 79; *Damodhur Abaji v. Martand Apaji*, Bom. H. C. P. J. 1875, p. 293.

(c) *See* Coleb. in 2 Str. H. L. 181.

(d) *See* *Neelkisto Deb Burmono v. Beerchunder Thakoor*, 12 M. I. A. 523; 14 M. I. A. 576; *supra*, note (b).

into it; nor should the Courts interpret the texts by the application to their language of strained analogies." (a) As to the weight to be given to decisions, "It is entirely opposed to the spirit of the Hindû customs to allow the words of the law to control its long received interpretation as practically exhibited by rules of descent and rules of property founded on the decisions of the Courts of the country," (b) and "a new construction ought not to be placed on a text of Hindû law contrary to the current of modern authority." (c)

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(a) *Bhya Ram Singh v. Bhaya Ugur Singh*, 13 M. I. A. 390.

(b) *Kooer Goolab Singh v. Rao Kurum Singh*, 14 M. I. A. at p. 196.

(c) *Thakoorain Sahibu v. Mohan Lal*, 11 M. I. A. at p. 403.

## SECTION II.

NATURE OF ADOPTION AND ITS PLACE IN  
THE HINDU SYSTEM.

Though Adoption now holds amongst the Hindû jural institutions a place second in importance only to Marriage, it has won this place only by slow degrees. A craving for a real, and failing that, for a fictitious, perpetuation of the family seems to have prevailed amongst the Hindûs from the earliest ages. (a) This craving has sprung less from a desire to satisfy the capacity for affection and protection,—though this has not been absent,—than from a sense of the need of a son to save the Brâhman from endless discomfort in the other world. (b) The connexion of putra (= son) with “put” (= hell) even if not well founded etymologically is ancient, (c) and corresponds to thoughts that have possessed the Hindû’s mind in all ages. (d) “Heaven,” says the Veda, “awaits not one destitute of a son,” (e) and “a Brâhman is born under three obligations; to the saints for religious duties, to the gods for sacrifices, to his forefathers for offspring. (f) He is absolved who has a son, performs religious duties, and has offered

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(a) See Ait. Brâhm. VII. 3, 9; Vasishṭha, Chap. XVII. para. 2; Manu IX. 8, 9, 45, 106; III. 37, 262, 277; IV. 184.

(b) See Âpast. Pr. II. Khand. 24, paras. 1, 3, 4; Vasish. XVII. 1—4; Baudh. Pr. II. Khand. 11, para. 34; Coleb. Dig. Bk. V. T. 270.

(c) Coleb. Dig. Bk. V. T. 302, 303.

(d) See Vishnu XV. 43 ss.

(e) Coleb. Dig. Bk. V. T. 311; Vîram. Transl. p. 115; *Huradhun Mookurjia* v. *Musst. Mookurjia*, 4 M. I. A. 414. Yet in the absence of a son the widow may perform the kṛtya and śrâddhs of her deceased husband. Steele, L. C. 34; above, p. 93.

(f) See Phil. of the Upanishads, p. 264. Comp. Manu III; 70, 81. Thus it is that “on viewing the face of his begotten son a father is released from his debt to his ancestors,” 2 Str. H. L. 198.

sacrifices." (a) When the Brâhman dies a son is indispensable "for the funeral cake, the libation, and the solemn rites." (b) These obligations of the son are persistently dwelt on in the sacred books, and when we see how the sacerdotal class were interested in the multiplication of ceremonies (c) it is easy to understand why the duty of paternity (d) was one which they never failed to magnify. The more sacrifices the more vicarious feasting and the more distributions to learned Brâhman; (e) the more prominent the position assigned to them. (f)

(a) Datt. Mīm. Sec. I. 5; so Baudh. Pr. II. Kaṇḍ. 11, para. 33; Kaṇḍ. 16, paras. 2—7.

(b) Daṭṭ. Mīm. Sec. I. 3; Viṣṇu XV. 43; Coleb. Dig. Bk. IV. Ch. I. T. 8. If unworthy, however, the son could be replaced. Coleb. Dig. Bk. V. T. 263, 264, 278, Comm. "Perpetuated offspring and a heavenly abode are obtained through a son, a grandson, and a great-grandson," Yājñ. quoted Coleb. Dig. Bk. IV. Ch. I. T. 36.

(c) See Manu III. 117, 146.

(d) Paternity, not Maternity. "Males only need sons to relieve them from the debt due to ancestors," Coleb. Dig. Bk. V. T. 273, Comm. Nor is adoption of a daughter warranted by any Smṛiti; *ib.* T. 334 Comm., though it is supported by Purânic legends. Manu V. 160, 161, in recommending continence to a childless widow, does not suggest adoption, but promises salvation as the reward of austerity. Comp. Steele, L. C. 34.

Nîlkanṭha gathers from Manu IX. 168 that, according to his precept, only a son, not a daughter, can be given in adoption. Vyav. May. Chap. IV. Sec. V. para. 6.

(e) See Gaut. Chap. XV. 5—15; Âpast. Pr. II, Khand. 16, paras. 3 ss; Manu I. 95; III. 97, 138, 145, 146, 187, 189, 207, 208, 236, 237. Individual moderation however is prescribed; Manu, IV. 186, 190, 195.

(f) Marriage is a samskāra that is strongly enjoined, *see* Coleb. Dig. Bk. V. T. 252, Comm; *see* Manu II. 67; III. 2, 4; Coleb. Dig. Bk. IV. Chap. I. T. 17.

The Brâhman should marry and light the domestic hearth as soon as possible after leaving his guru or teacher. A girl, it is prescribed, is to be married at from six to eight years of age, Steele, L. C. 26, though the validity of the marriage is not affected if she be under the age of maturity. Coleb. Dig. Bk. V. T. 338 Comm. The injunctions



It is strange to modern feelings how much amongst the ancients sacrifices and religious celebrations were conceived as a bargain (*a*) in which, for a consideration of oblations duly offered, (*b*) with formulas duly uttered, (*c*) protection and prosperity might be justly claimed. (*d*) There was but little bowing down before the sublime conception of Almighty benevolence, less dwelling on a single supreme Creator and controller of events than on partial deifications of persons and

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laid on the parents and on the husband by Manu show the main purpose of the union (*see* also Coleb. Dig. Bk. V. T. 198, 199; Datt. Mim. Sec. I. 5), but in consequence of the legal severance of a girl from her family of birth in some instances for years before her husband's unfitness can be discovered, and of her having in the meantime become disqualified by attaining maturity for another marriage, she remains a member of her quasi-husband's family, to which the marriage rites have transferred her. *See* above, p. 418; Manu III. 11, 37, 45; IX. 4, 26, 77, 81; Coleb. Dig. Bk. IV. Chap. I. T. 15, 16, 18, 19, 62, 64, 65, 66, 84. The sacred writings readily lent themselves to this, as they generally contemplated the replacement of a husband where necessary by a substitute. *See* *ex. gr.* Coleb. Dig. Bk. V. T. 231. In the case of a marriage ceremony performed between relatives or between persons of different castes whose marriage is forbidden no conjugal connection is recognized, the woman is put away and her children are illegitimate; but she is entitled to maintenance. Steele, L. C. 29, 30. On the other hand a mere defect in reciting the formulas (mantras) at the wedding is rectified by reciting them again correctly, *Ib.*

(*a*) *See* Ihne, Hist. of Rome, Bk. VI. Chap. XIII.; Soury, *Études Historiques*, p. 280; Phil. of the Upanishads, p. 262; Manu III. 63, 67; IV. 155 ss.

(*b*) Manu III. 279.

(*c*) *See* Baudh. Pr. II. Kaud. 11, para. 32; Kaud. 14, paras. 4, 5, 11, 12; Manu III. 217, 277 ss; IV. 99, 100; Apast. Pr. II. Kaud. 16, paras. 7 ss; Phil. of the Upanishads, p. 102.

(*d*) For the purposes sought to be attained by the due utterance of the "mantras" or spells, and their coercive force over the gods, reference may be made to Whitney's *Essays*, 1st Series, p. 20; *see* Manu IV. 234.

of qualities within the reach of a limited intelligence. (a) In the adoption of a son the Hindû aimed and still aims at satisfying an exacting group of manes greedy in the other world for recognition and offerings in this. (b) He looks too for appreciable benefits which he is himself to derive from the future ceremonies, (c) the fruit of which will reach him in the realm of shades. (d) He shrinks with horror from being left destitute beyond the pyre to suffer the mysterious anguish which awaits the man for whom no son can perform the Śrāddhas. (e) The stronger and more materialistic may resist this tendency, (f) in some few active faith is lost

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(a) "The innumerable gods of Hinduism are deified ghosts or famous personages, invested with all sorts of attributes in order to account for the caprices of nature. This is the state of the vulgar pagan mind; by the more reflective intelligence the gods are recognized . . . as beings capable of making themselves very troublesome; whom it is therefore good to propitiate, like men in office." Sir A. C. Lyall, *Asiatic Studies*, p. 51.

(b) *Manu* Chap. III. passim; *Vasish.* XI. 40—44; *Gaut.* XV. 15 ss. A higher range is attained in such passages as those quoted by M. Müller, *Lect. on the Sc. of Religion*, pp. 233, 265; comp. *ib.* 153; *Tiele, Anc. Religions*, pp. 114, 143. The manes were on particular occasions to be honoured with animal sacrifices. *Manu* V. 41; comp. v. 35.

(c) See *Manu* IX. 180; *Coleb. Dig. Bk. V. T.* 306; *Baudh. Pr.* II. Kand. 14.

(d) See *Manu* III. 274, 275. As to the sin of the son who omits to satisfy his obligations, see *Vishnu* XXXVII. 29; LXXXVI. 2; *Phil. of the Upanishads*, p. 264. The enumeration of the right seasons for oblations to the manes in *Yājñ.* I. 217, may remind one of the famous five reasons for drinking amongst the Western nations. So too *Vishnu*, LXXXVI—LXXXVIII.

(e) *Vishnu*, XX. 33—37; *Coleb. Dig. Bk. V. T.* 312, 313.

(f) Individual Hindûs have no hesitation (see the *Sarva-Darśana-Sangraha*, p. 10) in expressing their contempt for the whole system, but they are rare exceptions. Others think that their duty may be fulfilled and their salvation secured under the Hindû law by other means than procuring a lineage. They rely on such texts as *Yājñ.* I. 40, 50; III. 190, 204, 205; *Manu* V. 159.

in metaphysical subtleties, (a) some are too obtuse to realize the future at which others shudder; but for the most the pressure of a social opinion pervaded everywhere with these ideas, moulds their desires (b) and defines their spiritual outlook and their hopes and fears. In somehow acquiring a son the Hindû thinks generally that he is making the best of all possible bargains for himself in this world and the one to come. (c)

Various means for supplying a natural deficiency of male offspring were devised, or still adhered to the family in its gradual consolidation on a permanent type from the looser and grosser associations that preceded the dawn of civilization. Amongst these expedients Adoption, when first admitted, seems to have been received with but doubtful favour. (d) The levirate and the appointment of a daughter in one or other of the forms of these institutions must for generations and even centuries have been the approved modes of obtaining a substitutionary son. (e) Other methods, still less commendable, according to modern ideas, must have had a certain vogue, seeing that they are recognized in the sacred Smṛitis. (f) The final survival of adoption while the rival institutions

(a) See Phil. of the Upanishads, Chaps. IV. V. p. 263.

(b) For the ceremonies and the mantras or spells to be recited see Vishnu, LXXIII—LXXVI.

(c) See Manu III. 81, 82, 122, 127; Coleb. Dig. Bk. V. T. 270.

(d) Āpast. Pr. II. Pat. VI. Khand. 13, para. 11, positively forbids the gift equally with the sale of a child. He does not recognize the substitutionary sons. He condemns vicarious procreation, *loc. cit.* para. 7, at the same time indicating that it was common. Medhātithi, much later, contends that there can be no real substitute for the son, from whose production, not his replacement, the proposed spiritual benefit is to be derived. See Daṭṭ. Mīm. Sec. I. 36, and comp. the alternative rendering of Gaut. IX. 53, quoted under Vasish. XII. 8. This would forbid leaving the family of birth to join another by adoption.

(e) See Coleb. Dig. Bk. V. Chap. IV. Sec. III. Arts. I. and II.

(f) See ex. gr. the quotations in Coleb. Dig. *loc. cit.* Sec. IV.

perished is a mark of its greater suitableness to the moral sensibilities and needs of a society gradually advancing in refinement, yet clinging always to the traditions of the past. The field is here still encumbered with the remains of fallen structures which have engaged a good deal of the attention of the native authors. These have only a partial and occasional influence on the law of to-day, but some observations may be necessary in order to place Adoption in its proper historical relation to the rival, and no doubt older, institutions, which in the end it has supplanted and extinguished.

It is possible to trace in the Vedic literature (a) some indications of the appointment of a daughter to produce a son, not for her husband but for her own father. (b) This and the levirate (c) may be regarded as having in the Vedic period almost completely filled the space now occupied by adoption. (d) It is impossible to suppose that a subject of such importance as adoption, so stirring to the feelings of the religious, and so calling for ceremonies and sacred ministrations, should not have been frequently mentioned if in fact the institution was generally recognized when the

(a) It is necessary to go back so far to find the root of this as of nearly all existing Hindû institutions. See Whitney, *Or. and Ling. Studies*, 1st Series, pp. 101 ss.

(b) Müller, *Rigveda*, vol. I. p. 232; Transl. Tag. Lect. 1880, p. 249.

(c) A passage quoted in Muir's *Sansk. Texts*, vol. V. p. 459, makes it plain that the young widow of the Vedic period sought the society of her brother-in-law just as amongst the Jews. (See above, p. 420.) The frequent references to the same custom in the Smritis have already been noticed. (See above, p. 417 ss.)

(d) Above, p. 417; *Rig Veda*, X. 40, referred to above, p. 289. The Vedic passage apparently insisting on a really paternal relation as the condition of celebrating certain sacrifices has to be explained away in the *Datt. Mim. Sec. I. 44*.

hymns were composed. (a) Yet that it was creeping into existence may be inferred even from the exhortation against it as incapable of supplying a deficiency of begotten offspring. (b)

The levirate, as a means of raising up issue, became in the course of time disreputable amongst the Brāhmins (c) or at any rate somewhat discredited. It is by Manu made one of the reproaches of king Veṇa, who appears to have strongly resisted the pretensions of the Brāhmins, that he made this practice "fit only for cattle" a law for men. (d) Yet a few verses later the institution in a modified form is

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(a) The myth of Sunahśepa's giving himself to Viśvāmitra, who already had a hundred sons, is referred to in the R̥g Veda, but it is evidently not recognized as a part of the social system. Nor is it connected by any chain of natural development or deduction with adoption. A mere casual and partial similarity does not under such circumstances indicate derivation. Sunahśepa it appears must have already uttered mantras and must therefore have been initiated. Hence it is said arises an authority for the adoption of a son whose saṃskāras have been completed in another family. When history admits the legend, logic may accept the inference.

In the comparatively late Yajur Veda there is an instance in the story of Atri of a man's giving away all his children and in place of them adopting a religious ceremony. Such myths sprang merely from the unchecked play of invention. Taken seriously as examples for imitation they would warrant what the law strongly condemns, needless adoption and parting with all sons. The story of Manu's appointment of a daughter though he had sons, Coleb. Dig. Bk. V. T. 216, is not by any one held to validate a similar appointment now, nor is Pandu's liberal acceptance of his wife's children a pattern for a less meritorious generation. See Coleb. Dig. Bk. V. T. 301 Comm., T. 273 Comm. A further pitch of imaginative license is reached in the story of Dakṣa's appointing his fifty daughters and giving twenty-seven to one husband. See Coleb. Dig. Bk. V. T. 222.

(b) See the passages cited by Zimmer, *Altindisches Leben*, p. 318; and comp. R̥g Ved. I. 124, 125.

(c) Above, p. 418; Manu V. 161, 162.

(d) See Muir, *Sansk. Texts*, Vol. I. p. 297; Manu IX. 66.

fully recognized, (a) and a sonless woman it is admitted might be legally authorized to take a substitute for her husband. (b) Thus the ruder arrangements of a half-savage time (c) stand recorded side by side with higher conceptions still struggling for admittance. The higher cause prevailed, but its supremacy is even now not completely established amongst the primitive tribes. (d) Amongst the higher castes the older notions are virtually obsolete, yet in the law books we find rules still based on them with more or less of artificiality. (e) These instances of adjustment must be taken rather perhaps as proofs of the strong conservative

(a) Manu IX. 69, 70; comp. Gaut. Ad. 28, para. 19; Vasish. Chap. XVII. para. 11; Vishnu Chap. XV. para. 3.

(b) Manu IX. 147, 159, 161; Baudh. Pr. II. Kaṇḍ. 2, para. 12. Not only could a wife be borrowed, but a Brāhman might be hired, as well as a relative called in, to supply a suspected defect on the part of the husband desirous of offspring. See the passage quoted Datt. Mīm. § V. 16. Various bargains could be made between the father and the quāsi father; see the texts, Coleb. Dig. Bk. V. T. 213, 214, 217, 235, 238, 240, 241, 244, 252.

In the passage quoted Datt. Chand. Sec. III. 9, it is provided that a son begotten on the widow by a brother of the deceased husband is to be regarded as a son of the latter only. He is to take precedence as heir over sons begotten by the deceased on other men's wives. As to these see Gautama, quoted Coleb. Dig. Bk. V. T. 265. The Brahma Purāṇa, quoted *ib.* T. 217, would, taken without the gloss, reverse the order of succession.

(c) Polygamy, though the indications of it in the Vedic hymns are not frequent, is yet referred to, see Muir's Sansk. Texts, Vol. V. p. 458; Zimmer, Altin. Leb. 324. The seclusion of women seems from other Vedic passages not to have been practised. It is probable that under such circumstances a considerable license of manners prevailed, and of this there are several indications. Wilson, Rig Veda, 2, xvii.; Zimm. *op. cit.* 332, 334.

(d) See above, p. 375.

(e) Doctor Burnell, Introd. to the Mādhaviya, says: "Indian jurists never attempted to record such merely human details" as those of local custom, but the perusal of such a work as the Vyav. Mayūkha

tendency of learned men building on sacred foundations, than as the real grounds of customs which had an obvious recommendation in their fitness; but they give a peculiar turn to the reasonings on some points of the chief authorities which has had a palpable influence on the development of the practical law.

As an example of this, reference may be made to the rule that the place as heir of a member of a family disqualified by some personal defect may be taken by a son begotten either by the man himself or by a kinsman on his behalf. (a) The specific mention of these substitutes is held by the *Mitāksharâ* (b) to exclude a son adopted by a man himself disqualified for inheritance, and the *Smṛiti* has probably come down from a time when the family might refuse to accept any one not actually born in it under arrangements which provided that a child thus born shared the common ancestral blood. (c)

Another instance is the reference by some authors of the right of a widow to adopt a son without express authoriza-

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can leave no doubt that the commentators were no more independent than other human beings of the moral medium in which they lived. An ingenious and laboured interpretation not infrequently leads merely to a corroboration of what custom had already made law.

(a) *Mit.* Chap. II. Sec. 10, para. 9.

(b) *Ib.* para. 11.

(c) There was no such thing as a repeal of a *Smṛiti* law. *See above*, pp. 54-56. As the sacred writings were inspired all had authority, and when they clashed had in some way to be reconciled by interpretation (*see* *Manu* II. 12-15). Here the precise rule prescribed for the particular case is declared by *Vijñāneśvara* to override the more general law of replenishment of the family, and the rule has been preserved, though its effect now is to prevent disqualified persons from supplying their own places at all, comp. pp. 54, 55, above; *The Collector of Madura v. Muttu Ramalinga Sathupathy*, 12 M. I. A. at p. 435, and S. C. 2 M. H. C. R. at p. 231. It is a canon of construction that when there is a general rule a special one of possible narrower scope is to be interpreted so as not to deprive the wider rule of

tion to the duty in former ages of raising up seed to her deceased husband by an appointed relative. (a) And as this function was assigned to the brother or other near kinsman, so he, it was said, was the person to concur in an adoption by the widow, without which such an adoption could not be valid. (b) The Privy Council refused to admit the analogy as affording more than "an explanatory argument for an actual practice," (c) and placed the necessity for kinsmen's assent upon the ground of "the presumed incapacity of women for independence," but the logical method pursued by the native writers referred to and adopted by the High Court of Madras in this case is extensively applied in the Hindû law. (d)

It is only necessary to read the Smritis with a little care to perceive that something like a Spartan indifference to

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its general operation. See Datt. Chand. Sec. V. 27. This is equally a rule of the English law; see Co. Litt. 299 a, and *Ebbs v. Boulnois*, L. R. 10 Ch. A. at p. 484. The apparent contradiction is got rid of by a limitation of the one or the other rule as to persons, time, or place of operation.

(a) See *Collector of Madura v. Srimatee Muttu Ramalinga Sathupathy*, 2 M. H. C. R. at pp. 213, 221, 222, 224, 226, 230.

(b) *Ib.*

(c) S. C. 12 M. I. A. at p. 441. The Samskâra Kaustubha argues that a woman's necessary dependence does not disqualify her for adopting, but it does not decisively dispense with the assent of kinsmen, though these may incur damnation by wrongly withholding it. The construction given by the Śâstris (above, p. 864) is subject to this qualification.

(d) The principle of development on which, as a formulated scheme, the whole law of adoption rests, is strongly insisted on at 2 M. H. C. R. 227. The Judicial Committee at 12 M. I. A. 441, say that "as a ground for judicial decision these speculations are inadmissible": the force of any doctrine depends on its reception. (*Ib.* p. 436.) But the character of the doctrine is sometimes virtually conclusive for or against its admissibility, and the view expressed by the High Court may derive some support from the dicta of Lord Wensleydale in *Morehouse v. Rennell*, 1 Cl. & Fin. 546, adopted by Willes, J. in the



mere sexual purity (a) prevailed amongst the Hindûs whose habits and ideas are recorded in these ancient compositions. (b) In discussing the punarbhû (twice-married woman) and the svairinî (faithless wife) Nârada shows that irregular relations were common. The chief

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*Tagore* case, L. R. Suppl. I. A. at p. 68. On the other hand in *Reg. v. Bertrand*, L. R. 1 P. C. at p. 520, it is said that the Courts cannot make that law which the Legislature or usage has not made so. This is quoted and approved in *Reg. v. Duncan*, L. R. 7 Q. B. D. at p. 200. In *Dalton v. Angus*, L. R. 6 A. C. at p. 812, Lord Blackburne recognizes fictions as a beneficent usurpation, departure from which would be as great a usurpation by the Courts. That even principles quite foreign to the Hindû law may thus obtain reception and react on the whole system appears from the discussion above, p. 620 ss. See *Suroj Bunssee Koer's* case, L. R. 6 I. A. at p. 102.

(a) Vishnu, Transl. XV. 27, and Note. See McLennan, *Studies in Anc. Hist.* p. 178. For the legend of Vasishthâ, called in to his aid by King Saudasa, see Coleb. Dig. Bk. V. T. 22<sup>o</sup>, Comm. The controversy pointed at in Vasishthâ, Chap. XVII. paras. 6 ss. shows very clearly that in his time it was still an open question, whether additions to a family might not allowably be obtained by the aid of an outsider. Vasishthâ expresses no decided view. The puritan Âpastamba (Pr. II. Paṭ. 6, Khand. 13, paras. 6. 7) ascribes the son thus obtained to the real father, but the Vedic Gâthâ quoted by him necessarily implies that procreation by deputy was very common. Manu, IX. 51, ascribes the offspring to the woman's husband, comp. V. 162. He recognizes, IX. 162, that a man may have two heirs, one only of whom was begotten by himself, and takes it as of course that a child of an unknown father belongs to the master of the house in which he is born, V. 170; see above, p. 879 note (b). An indication of the same ancient usage is to be found in the Buddhist law, published by Mr. Jardine, Judicial Commissioner of British Burmah. In Chap. II. Sec. 89, it is said that where a daughter disapproving of the husband chosen for her by her parents gets a son procreated by another man, such a one is recognized as a Khetadza (i.e. Kshetrâja) son. This part of the Burmese law has obviously been introduced from India, and probably reproduces more archaic rules in many instances than those that have been preserved in India itself.

(b) The capture of brides by force or pretended force was common. It is noted of a blind daughter that any wooer may carry her off, and

care manifested is as to the ownership of the children, which is said to belong to him who has begotten them, if the husband has sold his wife's embraces, (a)

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no one hurl a javelin at him. Muir's Sansk. Texts, vol. V. p. 458; comp. Manu, III. 33, 34. In Baudhāyana, Pr. IV. Adh. I. para. 15, it is said that an abduction gives no marital right. The "mundium" jealously guarded by early European law was a corrective of the rough wooing of capture. It is found insisted on in the "Vagaru Dhammathat," translated from Pāli by Dr. Forchhammer; but the law is evaded by three successive elopements.

The passage quoted from the Atharva Veda in Muir's Sansk. Texts, vol. I. p. 280, seems to indicate that Brāhman women were sometimes taken from their husbands by powerful men. It shows also that Brāhmans married the wives or widows of Rājanyas and of Vaiśyas. In such a case the Brāhman is to be regarded as the only real husband. See Zimmer, Altin. Leb. p. 326. Such practices are far removed from the Brāhmanical usages and ideas of the present day.

(a) The purchase or hiring of another man's wife to procure offspring for oneself is authorized by the texts of Nārada, quoted in Coleb. Dig. Bk. V. T. 342, 343. See also T. 257, 264, 265 and Comm. The prevalence of such a custom affords the readiest explanation of the illegality of the adoption of a sister's or a daughter's son. The adopted is "a reflexion of a begotten son." The conditions of legality in the case of the begotten son adhere therefore as far as possible to his representative. Now when a sonless man leased another's wife to provide him with offspring, it was impossible that he should take his own sister or daughter: incest was abominable, while other immoralities had not yet assumed that character. When adoption took the place of procreation an imitation of nature was still kept up, and she who could not be to a man the actual mother of a begotten substitutionary son, was not allowed to be mother of *his* substitute the son given in adoption.

The Dattaka Mīmāṃsā, Sec. V. 16 ss. places the prohibition on the ground that a man could not be called in to procure a son for the husband of his own daughter or sister. The statement is of course quite true. The one form of license even with its limitation is as revolting to modern ideas as the other. Of the two it seems more reasonable to trace the rule to an extension of the fiction of a natural relation in the adoptive father's own family rather than to limitations on the replenishment of another family. The Roman

but otherwise (a) to the husband. Vasishṭha (b) calmly deals with the case of a woman who, having left the husband of her youth to live with another, afterwards returns to his family. She stands on the same social footing as a widow remarried in the family she joins. (c)

It is not amongst people of such habits and ideas that we can look for the delicacy which now characterizes the relations of the sexes in advanced communities. The gradual abolition of the grosser means of supplementing a family in favour of the system of adoption is itself a striking

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law said "Adoptio demum in his personis locum habet in quibus etiam natura potest habere," Poth. Pand. Li. I. Tit. VII. § XVI.; and the Hindū law of adoption presents many instances of the influence of the same principle, as in preventing a man's adoption of one older than himself, and whom therefore he could not possibly have begotten, and adoption by an immature girl who could not be mother of the representative son. See Steele, 388, 44, 48.

(a) Hence the story of Paṇḍu in the Mahābhārata, quoted Coleb. Dig. Bk. V. T. 273, Comm. There was much controversy on the point, as may be seen from Coleb. Dig. Bk. V. T. 253 Comm., and many other passages.

One of the laws of the Alamanni provided that where a man had carried off the wife of another he was to pay a fine to the husband. If the captor took her to wife while the fine remained unpaid any child resulting from the marriage before the fine was paid was to belong to the former husband. So as to the children of a daughter taken without the mundium or guardianship being acquired from her father, see Canciani, Leg. Barb. vol. II. p. 335.

(b) Chap. XVII. 19.

(c) Along with general censures of adultery (Manu IX. 30) there are in Manu (VIII. 352, ss.) and the other Smṛitis (Yājñ. I. 72, 74; comp. Vishnu XXXVII. 33,) such indulgences allowed as show that caste was thought much more of than mere chastity. Girls are indeed encouraged to fornication with men of high class. (Manu VIII. 365; comp. 2 Str. H. L. 162, and p. 376 *supra*.) The penalties provided are for the insolence of those who connect themselves with members of a class different from their own, (Vyav. May Chap. XIX. para. 6,)—in the case of men with their superiors (Manu VIII. 374 ss), in the case of women (Manu VIII. 371) with their inferiors. To the same

evidence of progress in civilization. The appointment of a daughter held an intermediate place between this and the

effect is Nārada. (Pt. II. Chap. XII. Sūtra 78; Vyav. May. Chap. XIX. para. 11; comp. 2 Str. H. L. 167.) The object of the restrictions and the indulgences was to maintain the lordly superiority of the twice born (Manu III. 155, 156, 178; IV. 80; V. 104; X. 317, 319; XI. 84, 101; XII. 43), and to prevent their corruption (Manu V. 89; VIII. 353; IX. 7; Coleb. Dig. Bk. IV. Ch. I. T. 8, 77, 78, 79, 83) through the infusion of low-caste blood; the sons being supposed to partake more largely of the nature of their fathers (Manu, III. 49; IX. 9, 32, 35, 36; X. 5, 12, 30, 64, 67, 72; Yājñ. I. 93).

The notion that male offspring partake more largely of the father's nature, and female offspring of the mother's, has been widely entertained: *see ex. gr.* Lucr. De Nat. Rer. IV. 1229—1232, Ed. Munro; and the denunciations of adultery that occur rests on its tendency to confuse caste, and to deprive the manes of the true ancestors of their due offerings,—a privation regarded as a great though undefined calamity. *See* Thomson's Bhagavadgītā, p. 7. Vasisṭha says (Chap. XXVIII. 1—9; Chap. V. 1—4.) that a woman is not by unchastity made more than temporarily impure. (So Yājñ. I. 72.) She imparts no taint of sin during dalliance, and is not to be cast off by her husband for any impurity. A tradition preserved in the Mahābhārata commends king Mitrasaha for accommodating the sage Vasisṭha with his wife Damayantī.

In the case of unmarried women the state of feeling may be gathered from the functions assigned to the Apsarases in the Vedic heaven (*see* Muir, Sansk. Texts, vol. V. pp. 307, 308, 345, 430; vol. IV. p. 461.) Manu's approval or permission of a sacrifice of modesty to a man of higher class (Manu VIII. 364) is reproduced in the Pāli law books of the Burmese. *See* Notes on Buddhist Law, III. Sec. 140, p. 14. And that some men had no troublesome sensitiveness about their wives' chastity is plainly indicated (*see* Vas. XIV. 6—11). The Taittirīya Brāhmaṇa gravely explains the character of the reward given for sexual association, and the sage Yājñavalkya (II. 290, 292) provides against cheating on either side. With "Dāsīs" or slaves not secluded, Nārada thinks connexion innocent (Nār. Pt. II. Chap. XII. paras. 78, 79), and he treats the ornaments of courtesans as exempt from seizure like the instruments of musicians, as the means by which they gain their livelihood. This way of regarding the subject has come down to modern times, and not to go farther Nilakaṇṭha in the Mayūkhya ranks courtesans with the members of other business

coarse materialism of the earliest modes of substitution. (a) It is no longer recognized, (b) but traces of the institution still remain in the existing law. From it on the one hand has been derived the right of succession of the daughter and the daughter's son, (c) while on the other it is connected with the fitness of a daughter's son for adoption. As an imitation of a real son the adopted son ought to be born of some woman whom the adoptive father could have married. (d) This excludes the son of a daughter, and such is the law generally received amongst the higher castes, (e) but amongst the lower castes sub-divisions of the great Śūdra class almost everywhere, and amongst some of the higher castes by their customary law, the daughter's son is deemed fit for adoption, and even the most fit on account of the place he might formerly have taken as a son by appointment, as well as of the blood connexion on which the system of appointment itself was founded. (f)

The passage of Vasishṭha (g) which directs that a man desiring to adopt shall make his selection from amongst

associations. (Vyav. May. Chap. XVII. 2; Chap. XIX. 10, 11; Chap. XXII.) The sisterhoods of dancing women must hence be deemed not wholly foreign to the Hindū system as it was, though that system contains within itself the means of a gradual purification corresponding to the advance in moral and social refinement manifested in the adoption of higher standards in the customary law.

(a) Coleb. Dig. Bk. V. T. 295, 296, 304.

(b) Vyav. May. Chap. IV. Sec. IV. para. 46.

(c) See above, pp. 84, 429; *Bhḍu Nānāji v. Sundrābāi*, 11 Bom. H. C. R. at p. 274.

(d) See above, p. 883, note (a).

(e) See Datt. Mīm. Sec. II. 74; Vyav. May. Chap. IV. Sec. V. para. 11.

(f) Datt. Mīm. Sec. II. 74, 93, 105, 107, 108; comp. Viṣṇu XV. 47.

(g) Chap. XV. para. 6; Datt. Mīm. II. 15, 75.

near relatives, and for choice take the nearest, (a) is so obscurely expressed as to admit of various interpretations. (b) How the ingenuity of commentators has been exercised upon it may be seen in Colebrooke's note to the Mit. Chap. I. Sec. 11, para. 13. The *Saṃskāra Kaustubha*, (c) and the *Nirṇaya Sindhu*, (d) construing the direction most liberally, approve the adoption, failing a *sagotra sapinda*, of a daughter's or a sister's son. (e) The *Śāstris*, following the *Vyav. Mayūkhya*, (f) are almost uniformly opposed to this, except in the case of *Śūdras*. (g) They rely on the impossibility of a real paternal and filial relation between the fictitious father and a son so born; and the decisions in Bombay must be considered perhaps to have confirmed the *Śāstris'* view, (h) but the customary law seems in a measure at least to have been represented by the doctrine of the two works referred to. (i) These were no doubt written under the influence of ideas which shaped the customary law, and they afford an example in their divergence from the more generally received authorities of parallel growths

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(a) This is not compulsory now, see *Sreemati Uma Dayi v. Gokool Ananddas Mahapatra*, L. R. 5 I. A. 40, 51, unless for Bombay a special local law is constituted by the *Vyav. May. Chap. IV. Sec. V. paras. 16, 19*. This does not seem to be admitted by the *Śāstris*. See below, Sec. 4.

(b) The *Datt. Mīm.* rests on a passage of *Śaunaka*. See *D. M. Sec. II. 2*.

(c) *Sec. III. pp. 455, 47a*.

(d) *Sec. III. p. 63a*.

(e) This is opposed to the *Datt. Mīm. Sec. II. 32, 33, 74, 95, 98, 102*.

(f) *Chap. IV. Sec. V. para. 36*.

(g) See *ex. gr.* above, p. 434.

(h) *Gopal Narhar Safray v. Hanmant G.*, I. L. R. 3 Bom. 273, 298; *Sriramalu v. Ramayya*, I. L. R. 3 Mad. 15.

(i) *Steele*, L. C. 44, 46, 183; 2 Str. H. L. 101. See *Gopal Narhar v. Hanmant G. Safray*, Bom. H. C. P. J. 1881, p. 175; S. C. I. L. R. 6 Bom. 107.

of doctrine springing from the same original source, yet taking quite different lines of development according to the medium in which they were placed. The real nearness of the daughter's son once procured ready acceptance for the doctrine of appointment, and this in its turn has facilitated the admission of the daughter's son as fit for adoption. The Śāstra had however to be interpreted accordingly, and this interpretation setting aside the ordinary doctrine of a necessary difference in the families of birth of the real mother and the adoptive father paved a way for the admission of the sister's son. (a) In the South of India the Brāhmanical law was for the most part apparently accepted only with this qualification, adapting it to previously existing customs, as in the case of marriage between the children of a brother and a sister rejected by the stricter law of the North, but allowed in the South, because it could not be prevented. (b)

The appointment of a daughter appears to have been conceived in two ways. According to the one the appointed daughter herself took the place of a son, (c) and then her son naturally succeeded her by representation. She was given for inheritance the place of a male, a place as a source of further succession, such as the Vyavahāra Mayūkha assigns her in the devolution of property not included amongst the special varieties of strīdhana. According to the other conception she was merely the instrument by which an heir to her father could be produced in the person of her son. (d) Vasishṭha places the appointed daughter third amongst the

(a) The sister's son was amongst many of the aboriginal tribes heir to his uncle, *see* above, pp. 283, 287; and as adoption became regarded as necessary to heirship he would thus appear to the lower castes the most fit for adoption. Amongst the higher castes such adoptions are probably imitations suggested by natural affection.

(b) Baudh. Pr. I. Adh. 1, Kaṇḍ. 2, para. 3; comp. *supra*, pp. 7, 155.

(c) Coleb. Dig. Bk. V. T. 203, 204, 215, 216; Vasish. Chap. XVII. para. 15. *See* Dr. Bühler's note *ad loc.*

(d) Viṣṇu, Chap. XV. paras. 4—6. The two senses of putrikā-putra are dwelt on in the Vyav. May. Ch. IV. Sec. VI. para. 43. The

subsidiary sons, and he says, (a) "It is declared in the Veda, a maiden who has no brothers comes back to the male ancestors, returning as their son." In Manu IX. 127ss, the transition may be observed to the second conception. The daughter, it is said, meaning the appointed daughter, is a man's heir failing a son, and as a woman's daughter usually takes the property given to the mother at her marriage, so in the particular case of the appointed daughter her son takes the property of his maternal grandfather through her. That her right is deemed the prior one appears from verse 134, in which it is said she takes equally with the after-begotten son of her father, and from v. 135, which on her death without a son gives the property that has devolved on her to her surviving husband. Yet in verse 136 it is said that by the son whom she produces "the maternal grandfather becomes in law the father of a son: (b) let that son give the funeral cake and possess the inheritance." This seems to make a subsidiary son of the grandson by the appointed daughter; but again in verse 139 this grandson is placed on the same footing as a son's son, which implies an intervening right through which his own is derived and a consequent precedence of his mother. Âpastamba makes no provision for appointment, or for the succession of a widow. He hesitatingly admits the daughter on failure of other heirs. (c) Gautama recognizes the son of the appointed daughter but not the daughter herself. (d) Vishnu has a

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institution, though continued in some places down to modern times, is distinctly excluded by Nilkanṭha from the law of the present day. Vyav. May. *loc. cit.* para. 46.

(a) Sec. 16.

(b) Colebrooke, Dig. Bk. V. T. 207 says "sire of a son's son," probably from a different reading. See also T. 209, compared with Manu IX. 131.

(c) Pr. II. Pat. 6, Khand. 314, Sūtra 4.

(d) Chap. XXVIII. Sūtra 33. He gives him only the tenth place, which is explained or explained away by Haradatta *ad loc.* and Vijñāneśvara in the Mit. Chap. I. Sec. XI. para. 35.



similar rule, (a) to which he adds one providing for the daughter's succession as such after the widow. (b) Bandhâ-yana (c) also recognizes the appointed daughter's son, but not the daughter, as a subsidiary son, to whom he assigns the next place after the son lawfully begotten. In his list the adopted son comes fourth.

By the time when the Mitâksharâ was written the daughter's right as heir had gained general recognition apart from her appointment. (d) As putrikâ-putra her place is speculatively recognized, (e) but as secondary to that of her son born under the prescribed condition. She no longer enjoys an equal right with her own after-born brother as in Manu, and her son ranks but as a subsidiary son, equal, as Viśveśvara says, to a lawfully begotten son in the absence of such a son, but inferior in being one degree more distant from the propositus. (f)

The son by simple adoption had in the mean time been gaining a greater and greater preference to the other substitutionary sons. When traversing a wide interval we pass from the Vedic period to that of the Smṛitis, (g) we find

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(a) Chap. XV. Sûtra 4.

(b) Chap. XVII. Sûtra 5.

(c) Pr. II. Adh. 2, Kaṇḍ. 3, Sûtras 15, 31. See Coleb. Dig. Bk. V. T. 213, and Comm.

(d) Mit. Chap. II. Sec. II. para. 5. See the *Utpâti* case, 11 Bom. H. C. R. at p. 274.

(e) Mit. Chap. I. Sec. XI. para. 3.

(f) The appointed daughter's son, superior to his own mother as heir to her father, had almost a counterpart amongst the Greeks. The heiress given in marriage by her father transmitted to her son a right of succession to her father which excluded herself and her husband, though, failing sons, she was capable of inheriting. See the seventh and ninth speeches of Isaeus, translated by Sir W. Jones in his works, vol. IX. pp. 188, 200 and 226, 231, with the summary of the Attic laws prefixed to the collection. The son born under such an arrangement appears to have been capable of taking both estates unless he had brothers. See Dem. *adv. Makart*; Secs. 12, 13, 14.

(g) Above, pp. 25 ss.

adoption recognized, but still in a comparatively subordinate rank, as a means of continuing the family. It is mentioned along with the appointment of a daughter, the levirate and other means of procuring offspring, in all the principal compilations whose precepts on this subject have been preserved. The different relative places assigned in these works to the different kinds of sons are due probably to the several modes of affiliation having come into vogue in different families or tribes long before any methodical classification of them was attempted. A reference to some vague principle or a mere convenience in enumeration determined the order of the sons in the earliest lists. In the later ones contained in such systematic compilations as *Manu* and *Vasishtha* the different kinds of sons are divided into those who are kinsmen and heirs, and kinsmen without being heirs. (a) Several lists are given in *Colebrooke's Digest*, Bk. V. Chap. IV., Sec. 1, and in the *Vīramitrodaya*, Chap. II. Pt. II.

The kinsmen not heirs are described by the *Mitāksharā* (b) as not heirs to collaterals. To their fictitious fathers they are in their turn equally heirs as the other substitutionary sons. (c) The place of the several kinds of sons in the one

(a) See ex. gr. *Gautama*, Adh. 28, paras. 29—32. This *Smṛiti* assigns the third place to the adopted son, making him a kinsman and heir, while the son of an appointed daughter stands tenth, and amongst the kinsmen without heirship.

(b) Chap. I. Sec. XI. p. 30.

(c) It seems probable from the rule evidently derived from the *Hindū* law, still preserved amongst the Burmese, that the "sons not heirs" were originally not heirs to their ceremonial father. They may have been taken merely to perform the indispensable exequial rites, as they seem to have had in competition with the other class no higher right than the illegitimate son; a right to what the father gave them. See *Notes on Buddhist Law* by J. Jardine, Esq., Judicial Commissioner in Burmah, Part V. Chap. II. Sec. 85. The *dharma-putra* or ceremonial son, appointed merely to perform exequial rites, not taking any share in the estate, is a still existing institution, Steele,

or the other class differs in different Smṛitis. (a) It is probably impossible to find any better ground of reason for the variances than that assigned by Vijñāneśvara, who says that precedence must be determined by the character of the subsidiary son. (b) Viśveśvara in the Subodhini says that Manu's list is a mere loose enumeration not aiming at a precise regulation of priority, and that the same observation applies to the other Smṛitis in which a similar apparent classification occurs.

This grouping of the several kinds of subsidiary sons in two classes with important differences of rights does not occur in the Smṛiti of Yājñavalkya on which the Mitāksharā is founded. The task of the native expositor was thus made easier, since taking Yājñavalkya as his guide, he construed the other Smṛitis with reference to this as the chief, but it forced him to go to other sources for the determination of the right of an adopted son to succeed collaterally. (c) This is established on the authority of Manu, (d) in whose list, as well as in Baudhāyana's, (e) the adopted son is placed in the higher class of sons and heirs. (f)

Yājñavalkya, II. 129—133, enumerates twelve kinds of sons as capable of continuing the succession in a Hindū family. These are: (1) the aurasa or ordinary son; (2) the

L. C. 185, 226. The Mādnaviṇya (Transl. p. 21) quotes Vishṇu as wholly excluding the four classes of sons of unknown paternity in competition with the legitimate son, refusing them even the quarter of a share allowed to other secondary sons. This passage is wrongly attributed it seems to Vishṇu, but it may still embody an ancient rule.

(a) Comp. Baudh. Pr. II. Kaṇḍ. 2, para. 23, with Gaut. Adh. 28, paras. 29, 30.

(b) See also Coleb. Dig. Bk. V. T. 277, Comm.; T. 278, Comm.

(c) Comp. Coleb. Dig. Bk. V. T. 277, Comm.

(d) Mit. Chap. I. Sec. 11, paras. 30, 31.

(e) Baudh. Pr. II. Adh. 2, Kaṇḍikā 3, paras. 20, 31, 32.

(f) See Coleb. Dig. Bk. V. T. 277, Comm.

putrikâ-putra, or son of an appointed daughter; (3) the kshetraja or son begotten by an appointed kinsman; (4) the gûdhaja, or one furtively produced in the husband's house; (5) the kânîna, the love-child of a damsel taken with her when she is married; (6) the paunarbhava, or son of a twice-married woman; (7) the dattaka, or son given by his father, by both father and mother, or by the mother alone with the father's assent, in his absence or after his death; (8) the kṛita, or the son bought; (a) (9) the kṛitrima, or orphan taken with his own assent only; (10) the svayamdatta, or son self-given either on losing his parents or being abandoned by them; (11) the sahodhaja, or son of a bride pregnant at the time of her marriage; (12) the apaviddha, or son cast out by his father and mother and taken as a son by a protector.

It will be seen that in the case of the first six there was either an actual connection by blood with the legal father or at least a strong probability of it. In the case of the last six this connection subsisted if at all only accidentally. The son by gift and acceptance stands at the head of this second class, and as the gradual purification of manners brought the other substitutionary sons into discredit, the son lawfully begotten and the son by adoption have now become the only ones recognized by the general Hindû law.

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(a) The sale of children by their parents was a recognized institution amongst the Romans. The gradual spread of Christian ideas made such sales disreputable, but the attempts to prevent them as illegal caused so much infanticide under the form of abandonment, that Constantine allowed sales in cases of distress. Justinian, after much hesitation, at last prohibited all alienations of children. They were still seized and sold by the Roman "revenue department" for some time after private sales had been forbidden. The person who preserved an exposed child (on the exposure of infants at Athens and Rome, *see* Petit, *Leg. Att.* p. 144,) with its parents' knowledge might keep it either as a son or as a slave (Maynz, *Dr.*, *Rom.* § 328), and infants might be given in adoption, but arrogation was till a late period limited to those who had attained the age of puberty and discretion (Tomkins and Lemon, *Gaius*, p. 96.)

Thus the Hindû law of the present day (a) does not recognize the putrikâ-putra (b) or any kind of subsidiary son (c) except the dattaka, (d) and in some districts the kṛitrima. (e) The latter mode of affiliation is still allowed in the Mithila region, (f) but it does not appear to be much in use. (g)

(a) See Vyav. May. Chap. IV. Sec. IV. para. 46; Smṛ. Chand. Chap. X. para. 5; 2 Str. H. L. 82; Coleb. Dig. Bk. V. T. 279, 280, 420, Comm.; Smṛiti Chandrikâ, Chap. X. para. 6.

(b) It is to be observed that the putrikâ-putra is not found in Manu's list of subsidiary sons, IX. 159, 160. But vv. 132 ss. leave no doubt that either the appointed daughter herself or else her son took the place of a son to the appointing father. Comp. 2 Str. H. L. 199.

(c) Many of the smṛitis allot to the substitutionary sons various specific aliquot parts of the father's estate. All such rules are inoperative, the Mâdhaviya says, in this Kali Yuga. See Mâdhaviya by Burnell, pp. 21, 22, 24.

(d) Steele, L. C. 43; Datt. Mīm. Sec. I. 64; MS. 1633; Coleb. Dig. Bk. V. T. 280; Vyav. May. Chap. IV. Sec. IV. para. 46.

(e) *Nursing Narain v. Bhutton Lall*, Sutherland's Rep. for 1864, p. 194. As to the Kṛitrima adoption, see Coleb. Dig. Bk. V. Ch. IV. Sec. X. note; *Wooma Dae v. Gokoolanand*, I. L. R. 3 Cal. 587 (P. C.) S. C., L. R. 5 I. A. 49, referring at p. 51 to *Ooman Dutt v. Kunhia Sing*, 3 C. S. D. A. R. 144; and see the cases under note (f) *infra*.

As to the classes (9) and (10), see *Balvantrav Bhaskar v. Bayabai*, 6 Bom. H. C. R. 83 O. C. J., deciding that an orphan cannot be adopted, though self-given or given by his brother; *Bashettiappa v. Shivalingappa*, 10 Bom. H. C. R. p. 268; *Subbaluammal v. Ammakutti Ammal*, 2 Mad. H. C. R. 129.

(f) The *Collector of Tirhoot v. Huopershad Mohunt*, 7 C. W. R. 500; *Mussamut Shibo Koeree v. Joogun Singh*, 8 ib. 155; *Baboo Juswant Singh v. Dooleechund*, 25 ib. 255; *Wooma Dae v. Gokhoolanund Dass*, I. L. R. 3 Calc. 587 (Pr. Co.); Tagore Lect. 1880, p. 527.

(g) In 2 Str. H. L. 155 ss. there is an interesting discussion between Colebrooke and Ellis on the legality in the present age of the Kṛitrima form of adoption by purchase. Ellis contends that in the South of India usage has sanctioned this form, and that the standard authorities, at any rate in the shape in which they have there been received, do

Amongst some of the lower castes the levirate still prevails (a) as a source of offspring received as legitimate. In Orissa the usage, once general, (b) is becoming restricted to the lower orders. (c) With these exceptions and those arising from the peculiar marriage customs of some of the non-Aryan tribes, (d) Adoption may now be regarded as the only legal means of satisfying the need of a son when natural offspring fails or has perished.

A Svayamdatta, the Śāstri said, was not to be recognized in the Kali Yuga, so that though a man of fifty and having children might be deemed apt for adoption, yet he could not be adopted if his parents did not survive to give him away. (e)

not prohibit it. Sir T. Strange referred the question to the Court of Tanjore, and there thirteen Śāstris were unanimous in pronouncing against the validity of such an adoption. In the same discussion Colebrooke admits that an appointed daughter may take the place of a son, as provided in the Mit. Chap. I. Sec. II, para. 23; but the Śāstris do not assent to this. They insist that in this Kali Yuga "the competency of any son other than that of the body and one given in adoption is repealed," and that the prohibition extends to all the castes. *Op. cit.* pp. 188, 189. See to the same effect the Śāstri, *ib.* p. 82.

(a) Above, pp. 418 ss.

(b) Coleb. Dig. Bk. V. Chap. IV. Sec. X. note. The practice in Orissa of raising seed to one deceased is recognized by Jagannātha; Coleb. Dig. Bk. V. T. 300, Comm. *ad fin.*

(c) Comp. 2 Str. H. L. 164.

(d) These have gained a partial recognition in various parts of India from the Brāhmins, who in return have imposed their own doctrines, and especially that of their own superiority on the classes below them. Proofs of these statements in the province of law we are now considering may readily be found in such works as Buchanan's Mysore, and Wilks's South of India. Mr. Ellis thought that the Kṛita or son bought was forbidden to Brāhmins only, but he was contradicted by Coleb. and the Śāstris. See 2 Str. H. L. 149 ss.

(e) MS. 1755; Vyav. May. Chap IV. Sec. V. para. 6. See Coleb. Dig. Bk. V. T. 275; the *Mahārāj* case, 1 Borr. 202 (No. 43); *The*

A section of the Mitâksharâ (a) is devoted to the subject of the Dvyâmushyâyaṇa, or son of two fathers. As a means of reconciling the texts of Manu which allow and condemn the procreation of a son by a substitute, (b) Vijñāneśvara expounds them as permitting this in the case of a widow who has only been betrothed, not in the case of one whose

*Collector of Surat v. Dhirsingji Vaghbaji*, 10 Bom. H. C. R. 235; *Balvantrao Bhaskar v. Bayabai*, 6 Bom. H. C. R. 83; *Subbaluvammal v. Ammakutti Ammal*, 2 Mad. H. C. R. 129.

The word *putra* employed in the Smṛiti passages to express "son" see ex. gr. Coleb. Dig. Bk. V. T. 273, does not properly include an adopted son. Hence these passages cannot be literally cited to justify the gift in adoption of an adopted son, or generally such a gift by a grandfather or other head of the family. Custom conforms to these restrictions, as may be gathered from the absence of cases of attempted gift of the kind in question in the records of the High Courts. Disinheritance is a different thing, and so is separation. See St. L. C. 185; Coleb. Dig. Bk. V. T. 264; above, pp. 583 ss. It is the parents or the father who must needs give in adoption, and to a father in person or represented by his wife or widow. See Coleb. Dig. Bk. V. T. 275 Comm.

The influence of a growing refinement of feeling is seen in the ascription to Vishṇu of the text by which the sons of uncertain origin were to be excluded from the funeral oblation and succession to the estate. See Mit. Chap. I. Sec. XI. p. 27, note; Vishṇu, Chap. XV.; Datt. Mīm. Sec. II. 61.

The influence of the older on the development of the newer institutions is well seen in the story of Śunaḥśepa on which the Saṃskāra Kaustubha, by a characteristic argument, founds a justification for the adoption of a man already initiated in his family of birth. The "given son," it is said, must include the son "self-given." Śunaḥśepa was self-given. It is not to be supposed that he had not been initiated. The transaction in his case cannot be questioned, as it rests on Vedic authority. Hence initiation does not impede "self-gift" nor consequently gift by parents in adoption. The story of Śunaḥśepa is relied on as an instance of a *svayamdatta*. See Coleb. Dig. Bk. V. T. 300, Comm., which immediately afterwards pronounces against any such substitutionary son in the present age. *Ib.*

(a) Chap. I. Sec. X.

(b) Comp. Baudh. Pr. II., Kaṇḍ. 2, para. 12.

marriage has been completed. The brother of the deceased husband may beget one son on the widow, who is to be formally married to him for this purpose, and the son thus produced belongs to the husband deceased, unless the procurator is himself destitute of male issue, in which case or by special agreement the son becomes a *dvyâmushyâyaṇa*, capable of offering oblations to both fathers and of inheriting from both. *Vijñāneśvara* thus mitigates the coarseness of the ancient rule. (a)

The raising up of seed in the manner here contemplated being disallowed in the present age (b) it is impossible that there should be a *dvyâmushyâyaṇa* of the original type. But the sense of the term has been extended by the commentators on the *Mitāksharâ* (c) so as to include the only son of one man given in adoption to another on an agreement that he shall retain his filial relation to the giver at the same time that he assumes it to the donee. The *Vyavahâra Mayûkha* fully accepts this doctrine, and deals at length with the double relationships that arise from such an adoption. (d)

The giving of a son as *dvyâmushyâyaṇa* is recognized by the Judicial Committee as allowed by the existing Hindu law. (e) In the case of an only or eldest son it is said the presumption is that his father would not break the law by giving him in adoption otherwise than as a son to both fathers. "This latter kind of adoption would not sever the connection of the child with his own family." (f)

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(a) See *Baudh. loc. cit.* ; *Nârada*, Pt. II. Chap. XIII. paras. 14, 23 ; and *Yājñ.* I. 68, 69.

(b) *Datt. Mīm.* Sec. I. para. 66.

(c) See *Mit.* Chap. I. Sec. X. para. 32, notes.

(d) See *Vyav. May.* Chap. IV. Sec. V. para. 21 ss. The translation of *Rao Saheb V. N. Mandlik* is here greatly superior to that of *Bordaile*.

(e) See *Wooma Dace's case*, above, p. 894 (e).

(f) *Nilmadhub Doss v. Bishumber Doss*, 13 M. I. A. at p. 100.



The Madras Sadr Court ruled (a) that the *dvyâmushyâ-yana* son is not to be recognized in the present age, but from personal inquiries it appears that he is not at all unusual in the Southern districts of Bombay. For this Presidency the *Śâstris* have held that an agreement may be made between the father of a boy and the man receiving him in adoption that he shall represent both as a son. (b) In a case in which a *Brâhman* had adopted a boy of a *gotra* different from his own it was said that the boy was to be regarded as a *dvyâmushyâyana*. As he would be subject to certain disabilities in his family of adoption, supposing his tonsure had taken place in his family of birth, the *Śâstri* seems to have given him the benefit of a presumption like that relied on by the Judicial Committee in the case lately referred to. (c)

It follows that for the Bombay Presidency the answer given to Sir T. Strange, (d) rigidly limiting succession to the *aurasa* or the *dattaka* son, cannot be regarded as an accurate statement of the law. Steele (e) includes amongst the rules of the customary law one to the effect that a boy adopted by his father's brother is to perform the *Śrâddhas* of both and to inherit the property of both, subject as to his real father's estate to a prior right of heirship down to a brother's son. This means simply that he is reduced to the

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(a) *Oonnâmala Awchy v. Mungalum*, Mad. S. D. A. R. for 1859, p. 81.

(b) MS. 1692; see Steele, L. C. 47. In the case of an adoption by an uncle the boy inherits from him. From his real father also, failing heirs down to brother's sons, i. e. to his own fictitious relation to his real father. *Id.* This agrees with what Colebrooke says at 2 Str. H. L. 121, that the son of such an adopted son belongs to the family of his father's *upanayana* (investiture) and consequent *gotraship*.

(c) MS. 1675. In the *Datt. Mîm.* it seems to be assumed as of course that a brother's only son taken in adoption becomes a son of two fathers. See below.

(d) 2 Str. H. L. 82.

(e) L. C. 47.

rank of a son of his adoptive father; but the Vyav. May. (a) makes him heir to his real father immediately on failure of other sons, at the same time that he ranks as heir to his adoptive father, though subject to be reduced to a quarter share by the birth of a begotten son.

The son of such an adopted son belongs, Colebrooke says, to the family in which the dvyâmushyâyaṇa received his investiture of the sacred thread. (b) In the Bombay Presidency the dvyâmushyâyaṇa celebrates the śrâddhas of both fathers, but his son it seems those of the grandfather by adoption only, not of his natural grandfather. (c) Whether any right of inheritance to the latter passes to him on his father's predecease has not been decided. (d)

It will be evident from the foregoing discussion how throughout the gradual narrowing of the field of choice a sense of the absolute necessity of a son, actual or representative, has never lost its hold on the Hindû mind. (e) This

(a) Chap. IV. Sec. V. para. 25.

(b) 2 Str. H. L. 122. He receives his own investiture in that family. Any adoption after investiture is an irregularity which causes the son of the person thus adopted to return to his father's gotra, if different from that of his adoptive family. Such an irregularly adopted son is called anityadatta. *Ib.* The adoption would probably not be recognized in Bombay. See Steele, L. C. 43.

(c) This statement rests on oral information as to the general practice. As to this however, and the right of succession see Coleb. Dig. Bk. V. T. 262, 263 Comm.

(d) As an only son he should not be given, and his succession in his family of birth would be excluded by brothers.

(e) The man of perfect life ought, at the close of his "householder" stage, to become a hermit, and hand over his temporal interests to his son. See Tiele, *Outlines*, &c. p. 128. The craving for a son to celebrate sacrifices is very widely spread. In China it is said that one half the families have adopted children. Only a sonless man can adopt. Nephews are to be taken by preference. The form is that of a sale which may be real or fictitious. See *Journal of North China Branch R. A. Soc.* Pt. XIII. p. 118.

central impulse has persisted through every variation of detail and must be recognized as due to the deepest-lying principles of the national character. That character is reverential, affectionate, and speculative, but always or nearly always within narrow limits and with a certain meagreness of thought. (a) In the family with its roots and its branches extending beyond the present world the Hindû mind has found its appropriate centre of interest, in the material perpetuation of the sacra, an intelligible and fit connection to their mutual advantage amongst all the members of the family line. (b) To it in its vulgar type an interchange of influence between the seen and the unseen is inconceivable except through the palpable connection of sacrifices. (c) They are indispensable, as the material chain was to Newton for the transmission of physical activity. (d) The purpose of the interchange that is sought is not of an elevated character, it is not spiritual expansion and enlargement of being, (e) but rather such limited and prosaic ends (f) as may conceivably be furthered by an humble type of divinities. (g) From the Vedic hymns downwards, boasts of sacrifices offered have been made the ground for never-ending claims to aid in the sordid exigencies of ordinary life. (h) Those of the family the son can best understand; he by his

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(a) As *ex. gr.* Baudh. Pr. II. Kâṇḍ. 14, paras. 9, 10; Kâṇḍ. 15, paras. 1—6. See Tiele, *Anc. Rel.* 123. On the mixed intellectual character even of the Brâhmanas, see Whitney, *op. cit.* p. 68.

(b) See Gaut. Chap. IV. 30 ss.; Chap. V. 3, 5, 9.

(c) See Thomson's *Bhagavad Gîtâ*, p. 7, and note 36.

(d) See Baudh. Pr. II. Kâṇḍ. 5, paras. 2, 3, 18; Kâṇḍ. 9; Kâṇḍ. 11, paras. 2, 3; Kâṇḍ. 12, paras. 11—15; Kâṇḍ. 14, para. 12; Kâṇḍ. 15, para. 12.

(e) See *Phil. of the Upanishads*, p. 266.

(f) See *Rig. Veda*, I. Hymn 9. *Âpast.* Pr. II. Pat. 7, Kâṇḍ. 16, paras. 24, 26 ss, show the former prevalence of animal sacrifices.

(g) See *Philosophy of the Upanishads*, pp. 10 ss.

(h) See *Rig Veda*, I. Hymns 12, 14; II. Hymns 4, 12.

initiation becomes born again into the unseen family; (a) he has the traditional formulas and sacred names. Without these little or no material good can be hoped for; failing a son by birth a substitute must be found to gain it; (b)—fertile fields, long life, (c) success in law suits, continuous male offspring, (d) and ruin of enemies. The nobler craving for an object of special affection, the desire to perpetuate one's name (e) and worldly influence, (f) the wish to educate a youth who may rule a chief's subjects kindly,—all these motives no doubt operate on occasion with more or less strength in inducing adoption, but the persistent cause and basis of the institution is the conception of spiritual gain, (g) an other-worldliness of a special variety. (h)

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(a) Manu II. 172.

(b) Capable therefore of gaining it or of receiving the requisite qualification by (tonsure and) the sacred thread. 2 Str. H. L. 100; Coleb. Dig. Bk. V. T. 273 Com.; *Lakshmappa v. Rámáva*, 12 Bom. H. C. R. 364.

(c) Baudh. Pr. II. Kaṇḍ. 14, para. 1; Pr. IV. Adh. II. para. 11; Āpast. Pr. II. Paṭ. 7, Khaṇḍ. 16, paras. 7 ss.

(d) Manu III. 262, 263, 277; Vishnu LXXVIII. 9, 19.

(e) See Āpast. Pr. II. Khaṇḍ. 24, para. 1; Datt. Chand. Sec. I. 3.

(f) Coleb. Dig. Bk. V. T. 312.

(g) Coleb. Dig. Bk. V. T. 304, 313.

(h) "Fathers desire offspring for their own sake, reflecting 'this son will redeem me from every debt whatsoever due to superior and inferior beings.'" Nārada, Pt. I. Chap. III. para. 5. Spiritual benefits however are not the only reason for adoption. The Jains recognize adoption though they have no śrāddha or paksha ceremonies, *Sheo Singh Bai v. Musst. Dakho*, L. R. 5 I. A. 87; *Bhagvān-dās Tejmal v. Rājmal*, 10 Bom. H. C. R. 261; *Bhala Nahana v. Parbhu Hari*, I. L. R. 2 Bom. 67.

Regard being had to the immeasurable benefits to be secured by the adoption of a son it may be a matter of surprise that any Hindū should, except through accident, die childless. The hope of a begotten son however is not readily resigned. The widow can be instructed to adopt. In poor families the expenses caused by an adoption both for the ceremonies and the subsequent maintenance of the adopted son cannot easily be met. In families

It is in this sphere of thought that the procreation of a son is regarded as imperative on a Hindû of the higher castes, or at least an endeavour to that end. (a) In the event of incapacity or failure it becomes a religious obligation (b) to adopt a son in order that the sacrifices may not fail. (c) The stringency of this religious obligation is strongly insisted on by Mitter, J. (d) It was in the case referred to made a ground for upholding an authority to adopt given by a minor as being an act at once obligatory and beneficial to

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of wealth and position the natural parents are brought into an intimacy that is not perhaps quite welcome, and there is always a chance of the attachment of the adopted son to his mother and his family of birth making him comparatively indifferent to the one he has entered by adoption. There is room for fear even of his plotting against his adoptive father and endeavouring to get him set aside. Many Hindûs being lukewarm and dilatory faintly intend to adopt but do nothing. Hence it happens that adoption is less practised than might be expected, and the right of selecting an heir to a chieftdom or a great estate often devolves on the widow. The interest which, in such cases, the representatives of the junior branches have in a good choice has gained general acceptance for the doctrine that their assent is requisite to the validity of the adoption, though this is not by all the Marâthâs perhaps regarded as absolutely essential. The widow, left to herself, is generally inclined to adopt. She thus in an undivided family gains consideration, and she is anxious to provide not only for her husband's *śrâddhs* but for her own and her father's, the celebration of which is a duty of the son, though not an absolutely indispensable one. See Vyay. May. Chap. IV. Sec. V. paras. 17, 36; Mit. Chap. I. Sec. XI. para. 9; Steele, L. C. 47, 48, 187, 394; Vîram. Transl. p. 116; *Bhagvandas v. Rajmal*, 10 Bom. H. C. R. at p. 265; *Rakhmâbai v. Rîdhâbâi*, 5 Bom. H. C. R. 181 A. C. J.; *Gopal v. Naro*, 7 Bom. H. C. R. XXIV. App.; Coleb. Dig. Bk. V. T. 273, 275 Comm.

(a) See above, p. 871; Baudh. Pr. II. Kand. 16, paras. 10-14; Pr. IV. Adh. I, paras. 17-19; and Manu IX. 137; Coleb. Dig. Bk. V. T. 270.

(b) 2 Str. H. L. 194, 198.

(c) Datt. Mîm. Sec. I. para. 5; Manu IX. 180.

(d) *Rajendro Narain Lahoree v. Saroda Soonduree Dabee*, 15 C. W. B. 548.

him. This deduction may be doubtful, and a merely religious obligation is not one that Civil Courts can enforce. Colebrooke says: (a) " Passages of law recommend, but do not enjoin, adoption for the oblation, the obsequies, and the honour of his name" according to a text said to be of Manu. The sense of the religious obligation felt by a true Hindû raises a presumption of fact which is of weight in cases of conflicting testimony, yet as has been said by the Judicial Committee: " Their Lordships do not deny the force of that presumption, but they cannot shut their eyes to the fact that childless Hindûs die daily without having fulfilled this obligation or made provision for its fulfilment after their death." (b)

Were the duty to adopt a son more than a merely moral obligation it would follow apparently that a power to adopt given to a widow (c) must be promptly executed. So long as a man lives he may in most cases reasonably hope for offspring, but with his life the possibility ceases, and the duty resting on his widow becomes imperative (d) and urgent lest she too should die without adopting. The Judicial Committee, however, approved the judgment of the Sadr Court of Bengal that the " fact of an authority to adopt being possessed by a widow, does not supersede and destroy her personal right as a widow," (e) and " the claim of a widow duly authorized to adopt to claim under any circumstances her personal rights until she does adopt is not

(a) 2 Str. H. L. 83.

(b) *Nilmadhuk Doss v. Bishumber Doss*, 13 M. I. A. at p. 100.

(c) *Huradhun Mookurjia v. Muthoranath Mookurjia*, 4 M. I. A. 414.

(d) This is more particularly the case when an express direction has been given by the deceased husband than where he has left the widow merely to fulfil the duty as her own conscientiousness and prudence suggest. *Musst. Subudra Chowdryn v. Golooknath Chowdree*, 7 C. S. D. A. R. 143.

(e) So *Musst. Tareenee v. Bamundoss Mookerjee*, 7 C. S. D. A. R. 533.

affected by a consideration of what might be the proper course if she could be proved to have violated any clear and positive legal obligation." (a) The widow must fulfil in good faith the direction given to her, (b) but she is allowed a discretion as to time and choice unless restricted by the terms of the power. (c) In the Bombay Presidency and in Madras a widow may adopt without an express power, (d) but this is not held to lay her under a positive legal obligation, or to prevent her husband from forbidding an adoption. (e) Nor are coparceners of the deceased husband, whose assent is generally necessary, compelled to assent to an adoption, as, were this a legal duty, they apparently must do. (f) The conclusion seems to be that "though it may be the duty of a Court of Justice administering the Hindū law to consider the religious duty of adopting a son as the essential foundation of the law of adoption and the effect of an adoption upon the devolution of property as a mere legal consequence," (g) yet it is only a duty of imperfect obliga-

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(a) *Bamundoss Mookerjee v. Mussamut Tareenee*, 7 M. I. A. at pp. 178, 190.

(b) A testator may bequeath property to a boy designated by him for adoption, and the widows must adopt the boy. They are not allowed to defeat the bequest by not adopting. "Widows" should for Bombay be "the elder widow," unless she refuses, and then the younger, *Steele*, L. C. 187; *Nidhoomoni Debya v. Saroda Pershad Mookerjee*, L. R. 3 I. A. 253.

(c) *Sreemutty Deeno Moyee Dossee v. Doorga Pershad Mitter*, 3 C. W. R. 6 Mis. Rul.

(d) *Mit. Ch. I. Sec. XI. para. 9*; *The Collector of Madura v. Moottoo Ramalinga Saththupatty*, 12 M. I. A. 397. The Pandit at 2 Str. H. L. 115 does not seem to have thought any sanction essential; *Colebrooke* did; *Ellis* thought it might possibly be needless amongst Śūdras, *ib.*

(e) *Bayabai v. Bala*, 7 Bom. H. C. R. 1 App.

(f) The *Datta Kaustubha*, as construed by the Śāstris, *see above*, pp. 864, 880, says their assent is not essential.

(g) *Pr. Co. in Sri Raghunadha v. Sri Brozo Kishoro*, L. R. 3 I. A. 191.

tion to which no right<sup>1</sup> corresponds in any person who can enforce it at law. (a) Even in the case of a widow authorized, and therefore morally bound to adopt, it was said that "no suit of that kind can be maintained." (b)

The adoption of a son being prescribed in order to supply the place of a son begotten, (c) the duty does not arise until the birth of a son becomes very improbable. (d) The existence of a son or grandson makes an adoption not only needless but illegal. (e) Loss of caste by the only son or the

(a) One does not look for entire consistency in works composed like the Smritis, and thus we find in Manu "many thousands of Brāhmins, having avoided sensual pleasures from their youth up, and having left no issue, have nevertheless ascended to heaven." Thus the ground of a compulsory duty is cut away by the highest authority, and salvation pronounced accessible by asceticism as well as by procreation or adoption. See Manu V. 159.

(b) *Musst. Pearee Dayee v. Musst. Hurbunsee Kooer*, 19 C. W. R. 127. *Comp. Bamandas Mookerjee v. Musst. Tarinee*, 7 M. I. A. 169, 190.

(c) *Datt. Mīm. Sec. I.*; 3 *Coleb. Dig. Bk. V. T.* 312.

(d) *Steele, L. C.* 43, 182. An adoption by an unmarried man, though improper, is not deemed void. *Coleb. Dig. Bk. V. T.* 273, *Comm.* But a stricter rule prevails in the Southern Maratha Country, *Steele, L. C.* 182. In *Jameona v. Bamasoondari*, *L. R.* 3 I. A. 72, it is taken for granted that the age at which a male may adopt is that of discretion according to his law. See also *Musst. Anundmooze v. Sheeb Chunder Roy*, 9 M. I. A. 287, and *Rajendro Narain Lahores v. Saroda Soonduri Dabee*, 15 C. W. R. 548.

Under the Roman law males only had the capacity for a true adoption, as they only could exercise the *patria potestas* under which the child was brought. (*Gaius*, I. 104). An imitative institution grew up by which women adopted heirs. The Emperor Galba was thus adopted, and the law was widened so as to recognize the fictitious relation thus created for purposes of succession. (*Maynz, Dr., Rom. § 328.*) The rights of succession were mutual, but no agnatic relation was created. (*Tomk. and Lem., Gaius*, p. 98). *Comp. 2 Str. H. L.* 128.

(e) *Steele, L. C.* 42; *Datt. Mīm. Sec. I. paras. 3, 5, 45, 47*; *Datt. Chand. Sec. I.* 6; *Manu IX.* 168. A son is to be adopted only to prevent a failure of obsequies, *Manu IX.* 180; *Coleb Dig. Bk. V. T.*



sole grandson, through an only son deceased, would, according to Hindû authorities, justify an adoption. (a) The son being bound to perform the funeral ceremonies of his father and the annual Śrâddhas to ancestors, besides the daily domestic sacrifices, and the many periodical and occasional celebrations incumbent on a Hindû householder, (b) the sinful taint attending exclusion from caste makes it impossible that he should fulfil these primary duties. They are all of a religious character and cannot be performed with the intended spiritual effect by one in a state of impurity. (c) But the outcast son or grandson may be restored to caste. (d) In some extreme cases it has been held that a father may disinherit his son; (e) it may be that when this step is taken the father may replace the son thus degraded by adopting another, (f) but it seems very doubtful whether an adoption would be valid while a son by birth still holds the status of a son, even though expelled from caste. (g) Should the father die in these circumstances he will have sufficiently intimated that he did not wish to deprive his

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301, Comm. But Jagannâtha contends that though a son is to be adopted for this particular purpose only, subject to the condition, yet for other purposes he may be adopted though a begotten son exist. This converts the condition imposed by Manu into a mere specification of purpose in a particular case. Kulluka's remark is more cogent, who says that when a temporal consequence (invalidity of the adoption) is deducible from the text, it is an illegitimate process to deduce only a moral one; i.e. the impropriety of adoption when a son already exists, while such an adoption may still be regarded as legal.

(a) Steele, L. C. 42, 181, 381.

(b) Manu IX. 180; Steele, L. C. 225; above, p. 585.

(c) See Steele, L. C. 42; Coleb. Dig. Bk. V. T. 319, 328, Comm.

(d) Steele, L. C. 381, 382.

(e) See above, p. 585; Coleb. Dig. Bk. V. T. 278 Comm.

(f) A grandson takes his father's place on the exclusion of the father, see above, p. 585; Steele, L. C. 224; and his existence prevents adoption; see Datt. Chand. Sec. I. 6.

(g) The practice of the castes was indulgent except when the inheritance was to a sacred office, Steele, L. C. 225.

son, and it would probably be held that the widow could not supplant the son by an adoption. The sacra follow the inheritance. (a) The non-performance of them, however reprehensible, does not deprive the heir of his estate. (b) The loss of caste, which formerly operated as a bar to inheritance, no longer has that effect. Competence to perform the sacrifices cannot therefore be deemed a condition precedent to the complete vesting of the estate in the son at the moment of his father's death, and the estate once vested cannot be taken away from him. (c) An adoption, even if made, would thus not affect the estate; in practice it does not occur. It is said no doubt that total loss of caste is equivalent to death, and may validate a second adoption when the first has in this way become abortive, (d) but it is clear that the statute law has on this point profoundly modified the Hindû law. (e) Full effect must be given to the intentions of the legislature, and though this may be consistent with a power of disinheritance for good reasons left to the father as a remnant of the *patria potestas*, (f) it is obviously inconsistent with a capacity in any one to supersede the heir, become owner, on a ground declared insufficient to prevent his succession.

The disability to inherit arising from loss of caste having been abolished there is a certain inconsistency in retaining the disqualifications arising from personal defects. These cannot, according to Hindû notions, put the sufferer from them into a worse position than would expulsion from caste. (g) They have not, however, been touched by legislation, and as we have seen they are still recognized. Sir T.

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(a) Manu IX. 142; Vyav. May. Chap. IV. Sec. V. para. 21.

(b) Steele, L. C. 62, 226.

(c) See above, p. 588.

(d) Steele, L. C. 45.

(e) See *Narayan Ramchunder v. Luxmeebase*, 1 Morr. 61.

(f) See above, p. 281.

(g) See Coleb. Dig. Bk. V. T. 321, 323.

Strange (a) thought that in such cases adoption was competent to the father who could not derive spiritual benefit from the incapable son; but by the customary law of Bombay it is said that the insanity of a son by birth is not generally a valid cause for adoption. (b) It is consistent with this, that the blindness or dumbness of a son should not justify adoption. (c) The marriage of Hindû children is a contract made by their parents: the children themselves exercise no volition, so that insanity does not necessarily prevent marriage. Marriage having been once contracted, the son of the disqualified person may take his place down to the partition of the inheritance; (d) and should he be incapable of adopting, his wife may, according to the Bombay authorities, do so in his stead. (e) His assent is implied where dissent has not been signified, and the act is one regarded as necessarily beneficial.

The same spirit of foresight, which makes the sonless man adopt a son, makes him who has but a few sons anxious not to reduce the number, (f) lest in the end he who stood so well for happiness in the other world should, through improvidence, incur the penalty of endless destitution. If he have but one son, the gift of that one (g) is everywhere reprobated as a grave spiritual

(a) 1 H. L. 77.

(b) Steele, L. C. 42, 181; comp. *ib.* 224.

(c) The caste rules vary as to insanity. The only case in which they all concur is that of loss of caste, which as it cannot now affect a son's right of inheritance would probably be held not to make adoption possible during his life. See Steele, L. C. p. 225, 381.

(d) Above, p. 585.

(e) Steele, L. C. 182.

(f) One of but two sons ought not to be given according to the Datt. Mīm. and Datt. Chandrikā. See below, p. 911.

(g) See 2 Str. H. L. 88, 107. There are some legendary stories of such a gift, but these are of no authority as law.

crime. By most the gift is thought invalid, (a) and this has been held by the High Courts of Bombay (b) and

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(a) *Vasishṭha* XV. 3; *Mit.* Chap. I, Sec. XI. para. 11; *Datt. Mīm.* Sec. IV. 7, 8; *Steele*, L. C. 384; *Coleb. Dig. Bk. V. T. 273, Comm.*; *Vīram. Transl.* p. 115; 2 *Str. H. L.* 88.

Jagannātha, followed by Strange and Macnaghten, brings the principle of *factum valet* to bear on the prohibition to adopt an only (or an eldest) son. *See* *Coleb. Dig. Bk. V. T. 273, Comm.* The adoption he says is valid, however improper. The *Mitāksharā* does not recognize this distinction. It ranks the unfit with the void gift (*see* 2 *Str. H. L.* 423), and it pronounces against the adoption without reserve. *Mit. Chap. I. Sec. XI. paras. 11, 12.* Jagannātha himself points out that according to the Maithila law the gift of an only son is illegal, even though he consent to the donation. *Coleb. Dig. Bk. V. T. 275, Comm.*; 1 *Str. H. L.* 87; 1 *Macn. H. L.* 67.

A prohibition or injunction resting on the essential qualities or mutual relations of its objects is distinguished as indispensable from one going only to an incident or matter of degree, or to the ceremony, a defect in which does not generally vitiate the purposed transaction if the precept has been complied with as far as was reasonably practicable. *Coleb. Dig. Bk. V. T. 273 Comm. in med.* See an instance of this quoted from the *Dharmdvaita-Nirṇaya* in *Rao Saheb Mandlik's Vyav. Mayūkha*, p. 55. The principle is not questioned, but the ground for its application is denied in the case of a śūdra adopting a daughter's or a sister's son. So in the case of marriage, *see* above, p. 888, 895. At Poona one caste only allowed that a ceremonial defect would justify the annulling of an adoption, while nearly all answered that one contrary to the Śāstra or to caste custom could be set aside. Some specify the adoption of one older than the adopter, some a sister's son, a cripple, idiot, or one taken without the requisite consent. *See* *Steele*, L. C. 184, 388. The ceremonies requisite for a change of gotra are insisted on by some as essential, *ib.* 46, 389, and several replies to this effect will be found below. Without these it would seem the adoption is incomplete. Once complete it is indefeasible. *ib.* 184; 2 *Str. H. L.* 126, 142.

(b) *Somasekhara Rāja v. Subhadramaji*, I. L. R. 6 Bom. 524, overruling *Bayabai v. Bala Venkatesh*, 7 Bom. H. C. R. App. 1. In *Dada v. Appa*, Bom. H. C. P. J. 1882, p. 294, it is intimated that the adoption of an only son is void except where validated by a special custom. Sixty castes, in answer to questions on the subject, said that an only son could not be given in adoption. Ten answered that

Calcutta (a). In every case the parting with a son, like the acceptance of a son, is too serious a step to be taken without the assent of the father (b) who so depends on him for all his future. Allowance is made too for maternal love, and thus it is said that both parents ought to concur in giving away a son. (c) Should no parents survive, a Śāstri said an adoption could not be made because they alone could make the ceremonial gift. (d) A rule almost as strict has been laid down by the High Court of Bombay, (e) but the customary law has in some few instances been construed as allowing the head of the family to give away a junior in adoption. (f)

At Madras (g) and Allahabad (h) it has been held that the gift of an only son is valid, the prohibition being only

he could, with the concurrence of both parties. Several made an exception in favour of the adoption of a nephew by his uncle; Steele L. C. 183. The last stands on a special footing, *see above*, p. 897, below p. 914; 2 Str. H. L. 107. At Madras and Allahabad the adoption of an only son has been allowed.

(a) Ben. L. R. 223, A. C. J.; I. L. R. 3 Cal. 443.

(b) Coleb. Dig. Bk. V. T. 273, 274, 275, Comm.; Vīram. Transl. p. 115; Vyav. May. Chap. IV. Sec. V. paras. 16, 17; Mit. Chap. I. Sec. XI. para. 9; Datt. Mim. Sec. IV. paras. 10 ss. Bālabhatta allows the gift by a mother in distress or after her husband's death, without special authorization. *See note to Mit. loc. cit. Rangubai v. Bhagirthibai*, I. L. R. 2 Bom. 377, citing *Narayan v. Nana*, 7 Bom. H. C. R. 153 A. C. J., *Ib. App. Bashetiāppā v. Shivlingāppā*, 10 Bom. H. C. R. 268, 271.

(c) Vyav. May. Chap. IV. Sec. V. para. 16; Steele, L. C. 45. The mother's assent is not indispensable, Mit. Chap. I. Sec. XI. para. 9.

(d) MS. 1755.

(e) *Bashetiappa v. Shivlingappa*, 10 Bom. H. C. R. 268; *Lakshmappa v. Rāmava*, 12 Bom. H. C. R. at p. 376, and the cases therein cited.

(f) MS. 1645. Comp. Panj. Cust. Law, Vol. II. p. 155.

(g) *Chinna Gaundan v. Kumara Gaundan*, 1 Mad. H. C. R. 54; *Singamma v. Vinjamuri Venkatacharlu*, 4 *ib.* 165.

(h) *Hanuman Tiwari v. Chirai*, I. L. R. 2 All. 164; Turner, J., dissenting.

directory, or on the principle of *factum valet*, and such was Sir T. Strange's opinion. (a) The Paṇḍits who have maintained the validity of such a transaction have not denied that it was directly opposed to their scriptures, but they have relied on there being "no express provision for setting aside an adoption made with due ceremonies." (b) Ellis too, on whom Sir T. Strange relied, seems to have thought "that if the act be duly completed it cannot be reversed." (c) The doctrine of *factum valet* has been discussed by H. H. Wilson in a passage already quoted. (d) Sutherland, the greatest European authority, declares the simple adoption of an only son impossible. (e) As he points out the Datt. Mīm. and Datt. Chand. disapprove the gift even of one of two sons. (f) Colebrooke also says (g) that with an exception to be presently noticed "a valid adoption of an only son cannot otherwise be made." Ellis thinks the exigency which warrants such an adoption must be distress of the giver, but he thinks the ceremony once performed is effectual, as in the case of marriage.

In *Lakshmappa v. Ramava* (h) Sir M. Westropp goes into the subject elaborately, and shows that "where there is an absence of authority to give there cannot be any gift." The attempted transaction is in such a case not *quod fieri non debuit* but *quod fieri non potuit*, and is simply void. (i) Referring to the explicit Smṛiti texts, the commentaries and seve-

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(a) 1 Str. H. L. 87.

(b) MS. 1695. *Arunáčhallam Pillai v. Ayyasvami Pillai*, 1 Mad. Sel. Dec. 156, quoted 1 Mad. H. C. R. 56.

(c) 2 Str. H. L. 108.

(d) Above, p. 809.

(e) Synopsis II. ; 1 Str. H. L. 87 note (2).

(f) Datt. Mīm. Sec. IV. 1, 8 ; Datt. Chand. Sec. I. 30.

(g) 2 Str. H. L. 107. He cites Mit. Chap. I. Sec. XI. para. 11.

(h) 12 Bom H. C. R. at pp. 391 ss.

(i) *Ib.* p. 393.

ral of the Vyavasthâs or official opinions used in the present work, his Lordship found "that the current of authorities was strongly against the validity of the adoption of an only son in this Presidency" (Bombay). (a) In another case decided by the same learned judge and a full bench it was ruled that the adoption of an only son was invalid amongst the Lingâyat caste, (b) and this has recently been carried to the point that a special custom is necessary to validate such an adoption. (c)

In Bengal the *factum valet* doctrine as applied to a prohibited adoption had been previously rejected in several cases, (d) as in effect it had in Bombay, where it was used in an endeavour to set up an adoption by a wife without express authority from her husband, (e) though in some other instances it had been admitted. (f)

Notwithstanding the contrary views therefore to which reference has been made, it seems probable that in Bombay as in Bengal the only son must be deemed generally incapable of adoption. The Vyav. Mayûkha (g) and the Mitâksharâ (h) are both express on the point. The Datt. Mimâmsâ and other authorities agree with them, (i) and the Sâstris expounding the local law have invariably pronounced against the adoption except in a few cases in which they

(a) *Ib.* p. 391.

(b) *Ramchandra v. Vithoba*, Appl. No. 1 of 1879 under Act XXVII. of 1860.

(c) See *Dada v. Appa*, above, p. 909.

(d) See *Baja Upendra Lal Roy v. Shrimati Rani*, 1 B. L. R. 221, and the cases referred to, 12 Bom. H. C. R. at p. 389.

(e) *Narayan Babaji v. Nana Manohar*, 7 Bom. H. C. R. 153 A. C. J.

(f) See the references in *Lakshmappa's case*, *supra*, p. 911.

(g) Chap. IV. Sec. V. para. 36.

(h) Chap. I. Sec. XI. para. 11, and Bâlabhattachâ's commentary in Colebrooke's note.

(i) Datt. Mîm. Sec. IV. paras. 1, 3, 7; Virâda Chintâmani, Transl. p. 74; Colebrooke in 2 Str. H. L. 88.

felt themselves embarrassed by the inapplicable doctrine of *factum valet*. (a)

In the case of *Haebutrao v. Govindrao Mankur*, (b) referred to by Sir M. Westropp in the judgment lately quoted, the question was submitted to the Sâstris of whether the gift in adoption of both of two sons could be valid. The impossibility of undoing an adoption once completed is insisted on in the answers, but the gift really in question was that of the sole remaining (and the eldest) son to the widow of the donor's brother. In such a case the passages which declare that by the existence of a son of one of several brothers, all are made fathers, have been variously applied by Hindú lawyers to support the approval and the disapproval of an adoption. Nanda Pandita in the Datt. Mimâmsâ (c) devotes an elaborate argument to proving that where there is a son of a full brother available for adoption, he and no other ought to be taken. (d) Even the son of a half-brother ought not to be chosen if the nearer relative can be had. And the injunction • he contends has such force that even the only son of a brother may be and ought to be adopted. (e) Without adoption he is not a son in the required sense to his uncle, and is indeed provided for as heir after his uncle's widow, his daughter and her son, while by adoption he does not lose his faculty of ministering spiritually to his real father and the ancestors who are equally ancestors of his adoptive father.

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(a) Steele, L. C. p. 384, shows that the castes, with a few exceptions, admit the restriction.

(b) 2 Borr. R. 83.

(c) Sec. II.

(d) So Steele, L. C. 182.

(e) The possibility of adopting the only son even of a brother is doubted by the Judicial Committee in *Srimati Uma Devi v. Gokoolchand Das Muheepatra*, L. R. 5 I. A. 49, 53. The customary law of Bombay favours this particular kind of adoption though generally opposed to the adoption of an only son; see Steele, L. C. 183.



It is obvious that in such a case the manes of progenitors will not be left destitute by the transfer of the boy to another family, while if filial relation to one of a group of brothers involves a similar relation to all, the real father must still benefit, though in a less degree, through the sacrifices of the son adopted by his uncle. The boy becomes in fact a *dvyâmushyâyaṇa* (a) who will perform his real father's obsequies and take his estate if that father should not have any other son. The *Mitāksharâ* and the *Vyavahâra Mayūkha* do not discuss this particular case, but as they recognize the *dvyâmushyâyaṇa* and the theories connected with his double relations, it seems that the adoption of an only son of a brother should, as an exception, be deemed permissible. (b)

As an only son cannot be given away in adoption, so on a strict conformity to principle ought the eldest son, if living, to be retained in his family of birth for the celebration of its sacra and the discharge of the father's obligation to his ancestors. This son alone, *Manu* says, (c) is begotten from a sense of duty, and on this he grounds a rule of primogeniture which is soon after qualified, (d) and which, as we have seen, has not, except in special cases, been retained in the law of inheritance. (e) The gift or acceptance of an only son, however, is expressly forbidden by the *Smṛitis*, (f) and

(a) *Datt. Mīm. Sec. II. 36*; above, pp. 897, 898.

(b) This was *Colebrooke's* view, *see* 2 *Str. H. L. 107*, where he cites *Mit. Chap. I. Sec. X. para. 1*, and *Sec. XI. para. 32*. So too *Sutherland, Synopsis, Head II.*

(c) *IX. 107*; *see* *Dâyabhāga, Chap. I. para. 36*; 2 *Str. H. L. 105*.

(d) *IX. 111*.

(e) *See* above, pp. 69, 736; *Dâyabhāga, Chap. I. para. 37*. It is pronounced a sin for a younger brother to precede the elder in offering a *Śrauta* sacrifice or in marrying, *Baudh. Pr. IV. Adh. 6. para. 7*.

(f) *Vasishṭha XV. 3, 4*; *Baudh. Pāṇishṭha, Pr. VII. Adh. 5, paras. 4, 5*.

this prohibition is recognized by the modern authors. (a) In the case of an eldest son, though the importance of him to his family of birth is so strongly insisted in the earlier authorities, yet more recent writers have in some instances pronounced the gift effectual, though censurable. (b) After such a gift there is still a son left to perform the father's obsequies, and no one supposes that if an eldest son dies a second son is not perfectly competent to take his place. Why not then when the eldest is removed from the family by gift? This may not be a satisfactory answer to an unqualified prohibition exacting obedience apart from the reasons that may be assigned for it, but it may have influenced the Śâstris in forming the opinion now and then expressed, (c) that the gift of an eldest son out of several is not invalid. The giving, it is said, in such instances is prohibited, but not the taking. (d) In Bombay it has recently been decided that such a transaction is legally valid. (e) Thus the case of the eldest son (f) is distinguished from that of the only son, the gift of whom has been pronounced void, (g) though possibly in part for reasons going beyond those set forth in the foregoing pages.

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(a) Datt. Mim. Sec. II. 38; Sec. IV. 1; Vyav. May. Chap. IV. Sec. V. para. 36.

(b) Vyav. May. Chap. IV. Sec. V. paras. 4, 5; 2 Str. H. L. 105. It is not opposed to Hindû notions that a man should benefit spiritually by moving another to an act which in him is sinful. See ex. gr. Baudh. Pr. IV. Adh. 8, para. 10 and note; Mit. Chap. I. Sec. XI. para. 10; Vyav. May. Chap. IV. Sec. V. paras. 13, 14.

(c) MS. 1612, 1621. So *Janokee Debea v. Gopaul Acharjya*, I. L. R. 2 Calc. 365. See 2 Str. H. L. 105.

(d) MSS. 1682, 1684.

(e) *Kashibai v. Tatia*, Bom. H. C. P. J. 1883, p. 40; S. C. I. L. R. 7 Bo. 225. So *Abaji Dinkar v. Gangadhar Vasudev*, 3 Morris, 420.

(f) *Somashekhara v. Subhadrâmâji*, I. L. R. 6 Bom. 524.

(g) *Dada v. Appa*, Bom. H. C. P. J. 1882, p. 294, referring to Appeal No. 1 of 1879, under Act XXVII. of 1860; *Vithoba v. Ramchandra*.

As in the absence of a son by birth an adopted son takes his place in relation to the adoptive father, (a) the same principle which prevents the adoption of a son while a begotten son exists, (b) equally forbids the adoption of a second while a first adopted son is living. (c) In the important case of *Rangamma v. Atchamma* (d) the Sâstris of the Provincial Courts of Madras pronounced in favour of multiple adoptions. They relied on a passage quoted by Jagannâtha to the effect that many sons are to be desired, as the father will get the benefit of the religious acts performed by any one of them, and maintained that several adoptions were as laudable as the procreation of several sons. They are supported no doubt by some of the treatises on adoption which take the passage in this sense, (e) but Jagannâtha appears to limit its meaning to the allowance of taking in adoption sons of the various descriptions, that is by the several modes of substitution or such as would spring from

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(a) Steele, L. C. 47. ; 2 Str. H. L. 218.

Under the Roman law the adoptive father could give his adopted son in adoption to another. (Gaius, I. 105.) This was by the earlier law. Justinian deprived an adoption of any one but a descendant of most of its legal effects, especially subjection to the patria potestas, so that an adopted son could not be given away again, nor was it worth while to give him away seeing that the adoptive father was under no particular obligation to him. In the case of sons taken by "arrogation" many safeguards were enacted to prevent their being defrauded by the adoptive fathers. (See Maynz, *op. cit* § 328 *ad fin.*) The latter was obliged to leave to his adopted son at least one-fourth of his estate.

(b) *Joy Chundra Race v. Bhyrub Chundra Race*, M. S. D. A. R. for 1849, p. 461.

(c) *Nursing v. Khooshal*, 1 Borr. 88; *Lakshmappa v. Ramava*, 12 Bom. H. C. R. 364; H. H. Wilson, Works, vol. V. p. 57.

The Athenian laws had such care for the adopted son that they did not allow an unmarried man who had adopted to marry without a special permission from the judges. (See Petit, *Leges Atticæ*, p. 141).

(d) 4 M. I. A. 1. See the discussion, 2 Str. H. L. 194.

(e) It is taken from the Karma Purâṇa, and being quoted by Hemâdri is from him copied by Kamalâkara in the Nirṇayasindhu.

wives of the different castes. (a) This cannot be regarded as more than a speculative licence, seeing that a marriage out of a man's own caste, or a substitution otherwise than by adoption, is no longer permitted, (b) but Sir T. Strange sets forth a double adoption as valid. (c) The doctrine however is entirely opposed to the Dattaka Mīmāṃsā, which allows only the sonless man to adopt. (d) In Bengal the passage as to several sons had already been limited to sons by birth, (e) though a second adoption was under peculiar circumstances, and perhaps wrongly, upheld. Sutherland pronounced strongly against the attempted extension of it, (f) and a similar opinion was expressed by Sir W. Macnaghten. (g)

The Judicial Committee on a consideration of the authorities determined, in the case just referred to, that a second adoption during the subsistence of the first was not to be allowed. (h) This decision, which has recently been reaffirmed, (i) agrees with the customary law of Bombay; (j) and the existence of a son's son equally with that of a son makes adoption impossible, (k) as in the absence of a son his son

(a) Coleb. Dig. Bk. V. T. 308, Comm.

(b) See however 4 M. I. A. at pp. 95, 96.

(c) 1 Str. H. L. 78.

(d) Datt. Mim. Sec. 1, paras. 3, 6. So also Datt. Chand. Sec. 1, para. 3.

(e) *Gouree Prosad Raes v. Joymala*, 2 C. S. D. A. R. 136, in 4 M. I. A. at p. 67.

(f) 2 Str. H. L. 85.

(g) P. & P. H. L. Vol. I. p. 80. A simultaneous adoption of two sons is not effectual as to either, *Gyanendro Chunder Lahiri v. Kalla Pahar Haji*, 1 L. R. 9 Cal. 50, referring to *Sidessurry Dossee v. Doorga Churn Sett*, 2 In. Jur. N. S. 22; see *Ib.* 24.

(h) *Rangama v. Atchama*, 4 M. I. A. at p. 102.

(i) *Gopee Lal v. Musst. Sree Chundraolee Buhoojee*, L. R. S. I. A. 131.

(j) Steele, L. C. 42, 45, 183, 387.

(k) Steele, L. C. 42.

represents him both in rights and in religious duties towards the family. (a)

The purpose of Adoption being such as we have seen, it would seem that consistency with the theory of the institution should have prevented an unmarried man from adopting a son. (b) Such a man can but seldom be able to say that he cannot have a begotten son, (c) and at any rate he is bound to marry. (d) The Dattaka Mīmāṃsā and Chandrikā do not contemplate adoption by a bachelor, nor in the rule laid down in the Vyavahāra Mayūkha (e) is there the express provision in favour of a bachelor's capacity that might have been expected, had there been an intention to recognize his right to adopt. Jagannātha however (f) says there is no law forbidding adoption by an unmarried man, and Sutherland (g) thinks such an adoption ought to be admitted. The Śāstris have in one or two instances said that a bachelor can adopt, (h) and the Sadr Court of Bombay upheld a similar rule as a local usage. (i) In Madras the question of a widow's capacity to adopt without trying the effect of a remarriage has twice been resolved in the affirm-

(a) In *Virbuddra v. Bacc Rane*, 2 Morr. 1, the question arose of whether an adopted son could renounce his adoption and return to his family of birth. The Śāstri, relying on Manu IX. 142, said he could not, but that he could resign his rights in the family of adoption on which the adoptive mother became free, with the consent of the near relatives, to adopt another son in his place.

(b) See Steele, L. C. 43.

(c) See Steele, L. C. 182.

(d) *Ib.* 25; above, p. 873.

(e) Chap. IV. Sec. V. para. 36.

(f) Coleb. Dig. Bk. V. T. 273, Comm.

(g) Note iv.

(h) MS. 1670.

(i) *Gunnappa v. Sankappa Deshpande*, Sel. Rep. 202 (2nd Ed. 229). See Steele, L. C. 182, which states a contrary rule for the Southern Maratha Country.

ative. (a) In the latter of the two cases an opinion was expressed in favour of the validity of adoption by a bachelor, but this was extra-judicial, and rested entirely on the authorities already discussed. Celibacy is very rare amongst Hindûs sufficiently rich to bear the expense of maintaining an adopted son, so that the validity of the adoption in question is not likely to occur often. Should it arise, the Courts will have to consider whether Jagannâtha's principle is the correct one, or whether adoption being allowed only as a privilege to supply a defect, the indulgence ought to be extended beyond the terms of the law permitting it.

It seems probable that adoption in the full sense has been but recently introduced amongst most of the lower castes (b) —recently, that is in comparison with its establishment amongst the twice-born. (c) It is the Brâhmana, not the man of inferior race, who is born with the triple debt to the gods, the manes, and the rishis. (d) The Vedic study due to the last is forbidden to the Śûdra. (e) The religious ceremonies, the celebration of which is the first duty of a Brâhman's son, do not exist for the Śûdras, and Vâchaspati contended that a Śûdra could not affiliate because he could not offer the requisite sacrifice and prayers. The Datt. Mīm. refutes this by reference to a text of Śaunaka, (f) which distinctly recognizes the adoption of a Śûdra by a Śûdra with liberty to take a daughter's or a sister's son—a liberty

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(a) *Nagappa v. Subba Śâstri*, 2 Mad. H. C. R. 367; *N. Chandrashekarudu v. N. Brahmanna*, 4 Mad. H. C. R. 270.

(b) As to the gradual extension of the Aryan influence, see Whitney's *Or. and Ling. Studies*, 2nd Series, p. 7.

(c) *Vasish. II.* pp. 1-4.

(d) *Vasish. XI.* 48; *Phil. of the Upanishads*, Chap. IV.

(e) *Vasish. XV.* 11; *XVIII.* 12-14; *Baudh. Pr. I.* Adh. 11, para. 15; Adh. 10, para. 5; *Manu II.* 115, 116, 173; *IV.* 81; *Âpast. Pr. I.* Khand. 1, para. 5.

(f) *Datt. Mīm. Sec. I.* 26; *Sec. II.* 74.

which the Vyav. May. makes a duty when such a son is available. (a) The authority (Parāśara) relied on by Nilkaṭṭha says that the requisite sacrifice may be offered by a Brāhmaṇa on behalf of the Śūdra, and is effectual for the latter, though a sin in the former. Adoptions by women are made effectual by similar vicarious celebration of the ceremonies. (b)

In a passage at 2 Str. H. L. p. 89 Ellis refers to a Dattaka Mimāṃsā of the Madhaviya in which it is said there is no adoption for a Śūdra. (c) The ceremonial adoption cannot, he shows, be properly performed by Śūdras (d) who are incapable of celebrating the fire sacrifice (Datta homam) with the requisite Vedic texts. (e) But the Śūdra having no gotra the transfer of a boy of that caste from one to another gotra cannot take place, and this transfer it is the purpose of the Datta homam to effect. He concludes not that an adoption is impossible, but that the ceremonies necessary in the case of one of the twice-born may be dispensed with and replaced by public acknowledgment.

The Maithila doctrine seems to disallow adoption by a Śūdra on the ground of his incapacity to offer the Homa sacrifice and recite the sacred formulas. (f) The Datt. Mīm. (g) refutes this by reference to the text of Saunaka; and Ellis, *loc. cit.*, says that a public avowal amongst Śūdras takes the place of the ceremonial prescribed for the other castes. Thus amongst Śūdras a formal gift and acceptance are sufficient, and may be established by

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(a) Vyav. May. Chap. IV. Sec. V. para. 11.

(b) Vyav. May. Chap. IV. Sec. V. paras. 12—15; Steele, L. C. 46.

(c) Comp. Gaut. Chap. IV. 25—27.

(d) See the extracts from the Śūdra Kamalākara and from Vyāsa at p. 433 of Rao Saheb V. N. Mandlik's Vyav. May.

(e) See 2 Str. H. L. 218.

(f) 2 Str. H. L. 131. See also the Vyav. May. Chap. IV. Sec. V. paras. 12, 13.

(g) Sec. I. 26; Sec. II. 74.

inference. The Datt. Mīm. Sec. I., 27, says that the express ascription of the power of adoption to Śūdras and to women who cannot pronounce the formulas necessarily implies that these may in their case be dispensed with, contrary to the Vivāda Chintāmaṇi, (a) and a Śāstri said that a Gosāvi of the Śūdra class could adopt but should omit the Vedic formulas. (b)

In Bengal it was at one time held (c) that even amongst the Śūdras the ceremonies of adoption could not be dispensed with. The services of a Brāhman it was said were to be obtained to do what the Śūdras themselves could not do towards the completion of the sacrifices. (d) But on a further consideration of the matter a Full Bench determined (e) that no ceremonies were essential except the giving and taking of the child. It is certain that Śūdras cannot recite the prescribed mantras; (f) the question really was whether their incapacity in this and other respects did not exclude them altogether from the institution. (g) This has been resolved in favour of their competence. (h) The purposes of adoption have been widened so as to embrace objects in which the Śūdra is interested equally with the Brāhman, and besides the kriyā and the śrāddhas the Saṃskāra Kaustubha insists on the necessity of preserving the renown of a deceased by

(a) Transl. p. 88.

(b) MS. 1678.

(c) *Bhyubbnath Tye v. Mohosh Chander Bhadooree*, 13 C. W. R. 168.

(d) So 2 Str. H. L. 130.

(e) *Beharee Lall Mullick v. Indur Mohinee Chowdhraim*, 21 C. W. R. 285.

(f) Steele, L. C. 46.

(g) Vyav. May. Chap. IV. Sec. I. para. 14.

(h) Ellis at 2 Str. H. L. 149, points out that the "twice-born" really means in the present age the Brāhmanas, and the Śāstris in some of their replies say that the Kshatriyas and Vaiśyas have disappeared as distinct castes. The application of the law of adoption thus restricted would be of comparatively very small extent.



alms, by feasts to Brâhmanas, and by pilgrimages. (a) A son too must assist his father in old age. (b) These duties a Śūdra's adopted son can perfectly well perform, and it is easy to understand how, as they are conspicuous, they should with many come to appear the most important. The desire to imitate the higher castes (c) has been gratified, and the impossibility of satisfying the ceremonial conditions has led to their sometimes being dispensed with (d) or regarded as not essential, (e) not only in the case of Śūdras but of the higher castes. (f) Where there has been a formal giving and acceptance the adoption is, for all classes in Bombay, as in Madras probably, to be regarded as complete. (g)

The custom in some castes, as Jains and Talabda Kolis, of adoption without regard to the spiritual benefits to be obtained through the adopted son, forms a point of transi-

(a) Steele, L. C. 42.

(b) *Ib.* 181.

(c) *See* above, p. 426.

(d) Manu regarded the śrāddhas apparently as not competent to Śūdras, Manu IV. 223; but this need not prevent a laukika adoption, i.e. one for mundane purposes, unless the latter are to be deemed purely incidental. The customary law approves and requires the celebration of the śrāddhas by nearly all castes, as may be seen by reference to Steele's L. C. 27, 42, 181, 380.

(e) *See* Ellis in 2 Str. H. L. 131.

(f) *See* Coleb. Dig. Bk. V. T. 273 Comm. The Śāstris usually insist on the regular ceremonies as indispensable, but they do not define which are essential. *See* Steele, L. C. 184, and the Section below on the METHOD OF ADOPTION. The castes annul irregular adoptions, Steele, L. C. 388. The Hindū authorities generally regard a boy defectively adopted as a dās or slave of the highest class; *see* below, "CONSEQUENCES OF ADOPTION."

(g) Steele, L. C. 184. *See* *V. Singamma v. Vinjamuri Venkatacharla*, 4 Mad. H. C. R. 165. In *Kenchava v. Ningappa*, S. A. 645 of 1866, 10 Bom. H. C. R. 265, the parties were not Brâhmanas but apparently Lingāyats. Jagannātha in Coleb. Dig. Bk. V. T. 273,

tion to a custom in other castes by which adoption is not

Comm., dwells at great length, if not with invincible logic, on the oblation to fire as being not essential. In *Crasnarav v. Raghunath*, Perry O. C. 150, the safe opinion is expressed that where the essential ceremonies have been performed the omission of unessential ones does not invalidate an adoption. Colebrooke more definitely pronounces the sacrifice not essential, 2 Str. H. L. 126, 131.

In *Sree Narain Mitter v. Sreemuthy Kishen Soondory Dasse*, L. R. S. I. A. 157, the Judicial Committee say: "The most important issue in the cause was whether there was a formal gift of the child . . . whether there was an actual delivery of the child in addition to the execution of the deeds." That was a Bengal case, but the parties were Śūdras; the decision is conclusive of the sufficiency of actual giving and receiving to constitute adoption in that caste in every province. Corporeal gift and acceptance are again pronounced necessary and sufficient in *Mahashoya Shosinath Ghose v. Srimati Soondari Dasi*, L. R. 7 I. A. 250. In *Bhagvandas v. Rājmal*, 10 Bom. H. C. R. 241, Sir M. Westropp, C. J., after pronouncing Jains subject generally to the Hindū law of inheritance, discusses an alleged adoption by gift to a man and his wife deceased. This his Lordship held to be impossible, but from what is said in the course of the judgment (*see* p. 265), it may be gathered that a gift accepted by the adoptive parents would have been thought enough.

*Lakshman v. Malu*, Bom. H. C. P. J. 1875, p. 186, was apparently a case between Marāthās, and there it was decided that there must be strict proof of the gift as well as of the acceptance.

These last two cases, though they point to the general sufficiency of a gift accepted, in so far as they do not dwell on any distinction of caste, yet do not precisely establish the validity of an adoption amongst Brāhmanas without the prescribed religious ceremonies. The Śāstris generally insist on these as indispensable, but in one case at least, that of *Jagannatha v. Radhabai*, S. A. 165 of 1865, it seems to have been held by the High Court of Bombay that no particular religious ceremony is absolutely necessary even in the case of Brāhmanas. It will be seen that there is hardly authority for laying down a proposition as to this caste with perfect confidence. The ceremonies are by all Brāhmanas thought important, and in practice the omission of them would throw such suspicion on an alleged adoption as to impair very seriously the proof of an alleged giving and taking with the requisite expression of intent.

recognized at all, or only under certain circumstances, (a) and with incidents different from those of ordinary adoption. The mere "celebrity of the name" (b) of the adoptive father hardly affords a sufficient basis in the absence of the intimate spiritual connection for so important a part of the family law as adoption, and the lower castes have in many instances proceeded but a short way in their imitation of the Brâhmanical institution. It seems probable indeed that such adoption as they recognize is of independent natural growth, and giving effect merely to an instinctive craving stands on a principle quite apart from the adoption commanded by religion and primarily serving religious purposes. In the continued associations of the lower orders with the Brâhmins their ideas on this as on other subjects have been coloured, sometimes quite changed, but in other cases they remain in substance what they have been from the first. Regarding such classes as dissenters from orthodox Hindûism the recognition of their own customs as binding on themselves is still consistent with the Hindû law. (c)

It will have been noticed that in several cases in the earlier parts of this work rights were set up by men claim-

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(a) In one case a thâkur (a Rajput Râjâ) seeking to exclude from succession his half-brother (elder) and his brother (younger) devised his estate (called a râj) to his daughter-in-law. The Śâstri pronounced this valid, and he said that the daughter-in-law could not adopt while the brothers of her deceased husband survived; MS. 281. This must have been an instance in which a son of an elder wife had taken precedence of an elder son by a junior wife, a modification accepted in some families of the rule favouring mere seniority of birth, see above, pp. 69, 78; Steele, L. C. 40, 60, 63, 178, 229. It is plain that the male kinsmen were opposed to the adoption, and that being so the case must probably be reduced to one in which a widow could not adopt for want of the requisite assent of the kinsmen, see Coleb. in 2 Str. H. L. 92; Mit. Chap. I. Sec. XI. para. 9, note. It does not appear that in the class in question the mere existence of male heirs makes adoption legally impossible.

(b) Datt. Mīm. Sec. I. 9.

(c) Above, p. 597.

ing as *pālaka-putras*, or foster sons of one deceased. A similar instance occurs in *Bhagvân v. Kâla Shankar*, (a) and it seems likely that the case at 2 Str. H. L. 113 was one of the same kind. (b) These instances point to a custom pretty widely prevalent amongst the lower castes by which a sonless householder assumed the guardianship of a boy, and either forthwith or afterwards declared him his heir, whereby without further ceremony he was vested with the rights of a son subject to partial defeasance only on the birth of a begotten son. (c)

The replies of many castes in Gujarath to Borradaile's inquiries show that the foster son was as well recognized amongst them as the son by regular adoption. In many

(a) I. L. R. 1 Bom. 641.

(b) See also Sp. App. No. 74 of 1851, M. S. D. A. D. for 1852, p. 62, referred to in *V. Singamma v. Vinjamuri*, 4 Mad. H. C. R. 165.

(c) Steele, L. C. 184. The *Pālaka-Kanyâ* amongst the dancers was an imitation which implied the pretty wide prevalence of the institution copied. See Steele, L. C. 186. In one case the Śāstri said a foster son of a temple dancer was her heir to an allowance from the temple estate. A foster-son, he said, may be heir by custom, MS. 1707, though according to the case above, Q. 4, p. 356, he can ordinarily take even by gift from the foster-father only so much as may be becoming and usual where there is a real son.

The adoption of a person *sui juris* under the earlier Roman law was a very solemn proceeding, to which effect could be given only by a decree of the people in the *Centuria Curiata*. (See Poste's *Gaius*, I. 107, Comm.) It was preceded by an inquiry and declaration of the Pontiffs that there was no religious objection, and being formally voted by the assembly after formal public questioning of the parties, was hence called "*Arrogatio*." (See *Gaius* I. 99.) It was accompanied by a formal renunciation of the *sacra* of the family of birth. These formalities were gradually disused, and at length adoption and arrogation were allowed by will as a mere means of constituting an heir who would preserve the testator's name. The adopted son retained his place in his family of birth while he acquired in that of his adoption merely a right of intestate succes-

cases adoption was not at all practised, (a) in some no foster son was taken. Especially where the remarriage of a widow was allowed it was said that no adoption or fostering by her was possible. "Yet," it was answered, "if the Śāstras allow adoption we cannot presume to set them at nought." (b) This indicates how adoption of the Brāhmanical type has gradually superseded the looser tie of mere fosterage. (c) The latter had the advantage that the foster son did not lose his right of inheritance in his family of birth, and that

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sion to his adoptive father (Maynz, Dr., Rom. § 328.) His position was thus very like that of the pālakputra amongst many Indian castes.

(a) Thus adoption is not recognized amongst the Kumbhārs at Surat (Borr. MSS. G. Koombhār 10). In some castes, as the Bhatele, the Śāstri said adoption is not allowed while there is a male kinsman surviving, MS. 405. The non-recognition of adoption was found to prevail amongst some of the Dekhan castes also, see Steele, L. C. 181, 381. This might be regarded as a survival of the objection to giving or taking a son recorded by Āpast. Pr. II. Khand. 13, para. 11; but the classes who reject adoption are probably for the most part non-Āryan in origin.

(b) Hujjām Kahnoomiya, Bk. F. p. 130. In the case of fifty-six castes at Poona it was said that ancient usage established by evidence and a vote of the caste constituted the law. But in cases of unusual difficulty Brāhmins were called in and a decision made according to the dharmasāstra. It is obvious that as transactions and affairs grow more complicated this must give to the Śāstras a continually widening influence as law. It is not thought necessary to conform to the Śāstra in every particular, but submission to it is considered as at least proper and desirable. See Steele, L. C. 122, 126. A Śāstri said that the different opinions held on the subject of adoption ought to be applied to any case according as they agree with the custom of the community, and in the case of a Brāhman with the doctrines of the Shākhā to which he belongs, MS. 405.

(c) The mānasaputra in *Abhachari v. Ramchandrayya*, 1 Mad. H. C. R. 393, was probably taken with an idea derived from a similar kind of fosterage at one time recognized in Madras. The Pandits said the mānasaputra was not known to the Hindū law, but the High Court held the *quasi* father bound by the deed of general donation in favour of the mānasaputra.

it fitted the needs and habits of castes to whom the elaborate system of adoption could not be adapted without violent distortions of the institution itself and of the customs amongst which it was introduced. (a) The foster son however has always been frowned on by the Śāstris. (b) He has failed to get recognition from the Courts, (c) and the member of a lower caste who now desires to benefit a nephew or the son of a friend has to adopt him in order to give him rights which will avail after the adoptive father's death. (d) The iron tie thus forged often becomes irksome to one or both parties, but the easier connection has been so discredited that it cannot apparently be restored except by an act of the Legislature.

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(a) Many classes called Ati-Śūdras rank below the recognized Śūdras themselves, who have been brought fairly within the Brāhmanical system.

(b) A man having purchased or otherwise obtained a boy brought him up as a foster-son, and bequeathed part of his property to him. The Śāstri upheld the bequest, but held that the legatee's title did not extend any further as against the blood relatives of the testator, as there had not been a formal adoption, MS. 122.

In another case it was said that nephews, though separated, inherit before a mere foster-son, MS. 119.

(c) See *Nilmadhāb Dās v. Biswambar Dās*, 3 B. L. R. 27, 32 Pr. Co.

(d) An intermediate case in which the Brāhmanical law of adoption has been partially accepted is that of the Talabda Kolis of Surat. The son is not taken for the same spiritual purposes as in the higher castes. His adoptive or foster father is to dispose of his property; but failing such disposition the foster son succeeds, and his rights in his family of birth are extinguished. Meanwhile he does not take his adoptive father's name as a true adopted son should do. These particulars are gathered from the papers in Sp. App. No. 64 of 1874.

The influence of imitation and a desire to rank higher in the social and religious scale, strong as it is, has done less in late years towards the assimilation of the lower classes to the Brāhmanical pattern than the action of the Courts. The law of the Dharmaśāstra being taken as the common law of the Hindūs, exact proof has been required of deviations from it, and on such proof failing through the ignorance or misapprehension of

The adopted son, according to Manu's rule (Chap. IX. 168, 169), must be "sadrisam" (=adequate, alike). This Medhātithi in his commentary explained as meaning of appropriate family and character. (a) But Yājñavalkya (Bk. II. v. 133) says the adopted or other subsidiary son must be of equal class with the father, and resting on this Nilakanṭha adopts Kullūka's interpretation of Manu to the same effect. It was a natural process, as marriage of a wife of lower caste became unlawful, (b) that adoption should be similarly restricted. It was part of the imitation of nature which has influenced the whole institution that when a Kshatriya son of a Brāhman became impossible, or one of intermediate caste, the adoption of such a son should become impossible also. The different construction given to the text of Manu under these different circumstances is a good instance of a process to which the smṛitis have frequently been subjected in adapting their precepts to the needs of the age.

A boy bestowed in adoption is usually given before the tonsure, (c) which amongst the twice-born takes place at

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those concerned, one rule after another of the Brāhmanical Code has been established as the law of the lower castes. Bold generalizations too have been ventured on, which by ignoring the distinctions of caste tend to uniformity at the cost of usage. A good instance of this is the broad statement in *Pandaya Telaver v. Puli Telaver*, 1 Mad. H. C. R. 478, that connubium subsists amongst the sub-divisions of each of the four historical castes. This is manifestly incorrect, as shown above, p. 776, however desirable it may be to get rid of restrictions on the choice of a wife.

(a) See Coleb. Dig. Bk. V. T. 285, Comm. So under the Roman law an adrogatio was allowed only after an inquiry "quae causa . . . sit adoptionis quae ratio generum ac dignitatis, quae sacrorum." Cic. Pro. Domo. XIII. 34; see Aul. Gell. V. 19; Willems, Dr. P. Rom. p. 84.

(b) Coleb. Dig. Bk. V. T. 173.

(c) As to the second birth of initiation see Vishnu XXVIII. 37—40; XXX. 44; Vasishṭha XI. 49—51; II. 3; Baudh. Pr. I. Adh. 2,

three, four, or five years of age. (a) The general opinion of Hindû lawyers is against the validity of an adoption after this ceremony into any other gotra than that of birth (b) and of dedication of the boy. (c) Within the same gotra, using the same invocations, an adoption at a later age is deemed permissible. (d) Amongst the lower castes the limitations resting on gotra relations in the stricter sense have no place. (e) In these cases, as marriage is the only initiatory rite giving an advanced status to the Śûdra, (f) some lawyers would pronounce married men unfit for adoption. (g) This opinion has not been generally accepted. (h) Men of all ages up to fifty have been adopted when

Kand. 3, 6, 12; Gaut. Chap. I. paras. 5-14; Manu II. 35, 36. The difference in status arising from the performance of the earlier Samskâras is indicated by the funeral ceremonies and the ceremonial impurity provided for in Manu V. 67 ss.

(a) Steele, L. C. 43; Coleb. Dig. Bk V. T. 182, 183, Comm. The genuineness of the text is doubted by Nilkanṭha, Vyav. May. Chap. IV. Sec. V. para. 20, and some others.

(b) *P. Venkatesaiya v. M. Venkata Charlu*, 3 Mad. H. C. R. 28; 2 Str. H. L. 104, 109.

(c) Coleb. Dig. *loc. cit.* See the Smṛitis quoted above as to initiation. The Śûdras are expressly excluded from it and from Vedic study, Āpast. Pr. I. Paṭ. I. Khand. 1, paras. 5, 8, 20, 21.

(d) Vyav. May. Chap. IV. Sec. V. para. 19; Steele, L. C. 44. *Sri Brijbhokunjee Maharaj v. S. G. Maharaj*, 1 Borr. R. 202.

Under the Roman law an adoption could not be attended with a "term" postponing its operation or with a condition making its existence insecure. (Maynz, Dr., Rom. § 328; above, p. 187.)

(e) Such relations as are contemplated in Vishṇu XXII. 21-24 cannot now be found. Quasi-gotra, i.e. blood relationships, are recognized amongst the lower castes, though not to the same distance of connection as amongst the Brâhmans.

(f) Coleb. Dig. Bk. V. T. 122; Rao Saheb V. N. Mandlik's Vyav. May. p. 431. As to women, Vishṇu XXII. 32. Various ages are prescribed by caste custom, Steele, L. C. 182.

(g) 2 Str. H. L. 87; Steele, L. C. 44, 383, 384.

(h) *Râje Vyankatrâo v. Jayavantrâo Ranadive*, 4 Bom. H. C. R. 191 A. C. J.; *Nâthâji Krishnâji v. Hari Jâgoji*, 8 Bom. H. C. R. 67 A. C. J. See Steele, L. C. 384.



no change of gotra (a) was involved. Even this change has been held not to be an obstacle, (b) as the tonsure and even investiture may be annulled, (c) but it may be doubted whether this licence ought to be recognized in Bombay. (d) The Sâstris are generally opposed to it: the High Court seems in one case to have looked on it with favour, (e) but the case was one between Śûdras in whose case there could be no initiation by tonsure and investiture to undo. (f)

In the case even of an adult the giving by his father or mother cannot be dispensed with. (g) The adopted son's own assent is equally necessary when he has reached years of

(a) Steele, L. C. 43. Within the same gotra no ceremonies other than gift and acceptance are essential. Steele, L. C. 46. Comp. Coleb. Dig. Bk. V. T. 275, Comm.

(b) Datt. Chand. Sec. II. 26 ss.

(c) Datt. Mim. Sec. IV. 50—52.

(d) See *Balvantrav v. Bayâbai*, 6 Bom. H. C. R. at p. 85.

(e) *Lakshmappa v. Ramava*, 12 Bom. H. C. R. 364, 371.

(f) There is no Śrâddha even, in the proper sense, for a Śûdra. It involves ceremonies which the Śûdra cannot perform. See above, p. 873, 919.

(g) *Bashetiappa v. Shivalingappa*, 10 Bom. H. C. R. at p. 271; *Collector of Surat v. Dhirsingji Vaghbdji*, ib. 235; *Subbaluvammal v. Ammakutti Ammal*, 2 M. H. C. R. 129; *Balvantrav v. Bayâbai*, 6 Bom. H. C. R. 83 O. C. J. The formula pronounced by the giver is appropriate only to the father, see 2 Str. H. L. 218. Hence, as the cases decide, an orphan cannot be given by his brother. In Steele, L. C. p. 46, it is incidentally noticed that an elder may adopt a younger brother. This may have been established in some castes by custom, but instances of the custom have not occurred in the superior Courts, or have been so rare as to escape particular observation. It is opposed to the generally received principle of a possibility of union between the real mother and the adoptive father, but this principle is not regarded amongst Śûdras.

A woman (widow) cannot adopt until she attains puberty and therefore could be a mother. Steele, L. C. 48. A man *ought* not to adopt prematurely. *Ib.* 43.

Under the Roman law the imitation of nature was held to prevent the adoption of any one who was not at least eighteen years younger

intelligence. (a) The son, though a man's own, is not a chattel to be given away without his own consent, (b) and the rule of Baudhâyana (c) which exacts this in the case of a Kṛitrima adoption is equally applicable to any case where the person adopted is old enough to have a will and judgment of his own. (d) While he has no discrimination his father may part with him, but only, according to the religious law, under the pressure of some great exigency. (e) Parents

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than the adoptive father (Maynz, Dr., Rom. § 328). In case of arrogation of one *sui juris* the adoptive father was required to be sixty years of age. Fifty is the age prescribed in the French and the Italian Codes.

Gaius says it was still disputed in his time whether any one could adopt a person senior to himself; but this was afterwards settled so as to require a seniority of eighteen years in the adoptive father. (Poste's Gaius, I. 106, 107, and Comm.)

(a) Coleb. Dig. Bk. V. T. 275, Comm.

Under the Roman law of the XII. Tables a father could transfer his child by mancipation, (*see* Cod. Li. VIII. Ti. 48 l. x.) which in the case of a son given in adoption had to be performed thrice (Maynz, Dr., Rom. § 326), though for a *noxæ datio*, in which a son was given up to escape damages incurred on his account, a single ceremony was sufficient. Justinian replaced this ceremony by a declaration made before a public officer (*op. cit.* 328.) In the case of a boy *sui juris* his "arrogation" or gift of himself had to be preceded by an inquiry whether this would be advantageous to him. (Gaius I. 102.) His express assent was required (Gaius, I. 99) as well as that of his guardian if he had one. An ordinary adoption could not be made against the consent of the boy adopted, but in the absence of protest the gift by his father or other person exercising the *patria potestas* was sufficient, and at the same time indispensable. An "arrogation" was under the later law completed by a rescript under a petition to the Emperor. (Maynz, Dr., Rom. § 328.)

(b) Vyav. May. Chap. IV. Sec. I. paras. 12, 13; Datt. Mīm. Sec. IV. 47.

(c) Coleb. Dig. Bk. V. T. 284.

(d) *See* Datt. Mīm. Sec. IV. 47; Bālabhaṭṭa on Mit. Chap. I. Sec. XI. para. 9.

(e) Mit. Chap. I. Sec. XI. para. 10; Vyav. May. Chap. IV. Sec. I. paras. 11, 12, 15; Chap. IX. para. 2.

are to bestow their son with anxious care (a) on one to whom he has an affectionate feeling. (b)

Jagannâtha, relying on the fact that the Smṛiti texts speak only of the adoption of sons (c) denies altogether that a daughter can be adopted. The Datt. Mīmāṃsā, Sec. VII., has an elaborate argument to establish that an adoption of a daughter may be admitted by analogy to that of a son. The argument would have been needless had the sacred writings afforded any direct authority for Nanda Paṇḍita's position. He supports it by several instances drawn from the Purāṇas, but whatever weight may be due to these they have not led to any general imitation which would constitute a custom. When we consider the main purpose and the history of adoption it is plain that the admission of a daughter within the scheme would be quite anomalous. Even the appointed daughter taking in her own person the place of a son was centuries ago found incongruous with the general Hindû system, and no local law seems to have preserved or invented such an exaggeration of a discarded rule as would be involved in recognizing a substitutionary daughter bound as a daughter to leave the family by marriage.

It was said indeed that the adoption by a woman of a daughter given by her mother might be recognized if conformable to the caste rules, (d) and there are no doubt several venerable legends which state or imply the giving of daughters. On these a system of female adoption might

(a) Vyav. May. Chap. IV. Sec. V. para. 1.

(b) Manu IX. 168.

(c) Coleb. Dig. Bk. V. T. 420, Comm.

Women could not originally be adopted under the Roman law, and it is obvious that they could not serve the intended purpose of maintaining the family sacra. But as this purpose was gradually superseded by considerations of another kind, the adoption of daughters as well as of sons was allowed. (Gaius, I. 101.)

(d) MS. 1681.

have been built, but it must have been the embodiment of a theory essentially distinct from that which has in fact prevailed in the law of adoption. The process must be looked on as merely imitative, and having no other jural efficacy than may be given to it by some special usage. It does not appear that any caste rules in the Bombay Presidency allow such an adoption, in the sense of giving a particular status to the adopted daughter. (a)

The relation of a Guru and his disciple is said to be similar in many respects to that of adoptive father and son. (b) It is a relation recognized by the Śāstras, but the connections subsisting amongst ascetics of the lower castes and their disciples are governed entirely by the custom of the class or of the institution to which they belong. (c) Some

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(a) See 2 Str. H. L. 217. In the case of an adoption by a Kalavantin (temple woman) the Śāstri replied that no rules for such an adoption were to be found in the Śāstras, MS. 1651. In Steele's Law of Caste, adoptions by dancing women are incidentally recognized as possible, p. 183. But the adopted girl is called a pālak-kanyā (foster-daughter) p. 186, and the (so-called) adoption may be annulled at the pleasure of the foster-mother, p. 185, while a true adoption cannot be annulled, p. 184. It is therefore merely an imitative institution which can be supported on the custom of the class only if the class are as such capable of making binding rules for their members. This is denied in the Nāikin's Case (*Mathura v. Esu N.*, I. L. R. 4 Bom. 545) as opposed to public policy and to the general customary law of the Hindūs as constituted by present usage. The purchase of children by dancing women was once common. Such children ranked as slaves, 2 Str. H. L. 225, 229. Ellis at 2 Str. H. L. 128, says that women have no right to adopt even for the transmission of their separate property. "No spiritual benefit," he says, "results to a woman from adoption." But then śrāddhas are performed by their sons, whether real or adopted. The incapacity must be placed on other grounds, such as those stated in the text.

The Roman law seems not to have allowed an arrogation of a female prior to Justinian's legislation. Ort. Inst. § 140.

(b) Steele, L. C. 192, App. B. para. 12.

(c) 1 Str. H. L. 150.; above, pp. 550 ss.; Steele, L. C. App. B. A Śāstri replied in one case that all classes, gosāvis included,

gosâvis buy boys to bring up as their disciples and successors. (a) More frequently they take them by gift as pupils and spiritual sons without the ceremonies of adoption, (b) the theory of which indeed is opposed to the ranking of such boys as adopted sons. It is the grihastha or householder (c) in the stage of life when he may properly attend to worldly affairs who is bound to provide a son for the continuation of the family. (d) A man retired from the world has no such duty. The ascetic who renounces ordinary affairs (e) as a young man, ought to do so effectually, and look to spiritual fatherhood (f) as the only one open to him for the future. (g) The relations of the gosâvi and his disciple differ widely, as has been seen, from those of the ordinary father and son, and though some of the ceremonies of adoption are imitated in taking a *chela*, the latter does not in any practical sense become an adopted son. (h)

The effect of adoption is to sever the boy adopted entirely from his family of birth. (i) His proper residence is with

can adopt with the due ceremonies. Gosâvis, he said, must be considered Śūdras, and in adopting omit the recitations from the Vedas, MS. 1678.

(a) Colebrooke points out that the practice of gosâvis and sannyâsis in this particular is analogous to adoption by purchase, which is itself obsolete, 2 Str. H. L. 133.

(b) *Op. cit.* para. 26 ss.

(c) Vasishṭha, VIII. 1, 11.

(d) Āpast. Pr. I. Paṭ. I. Khaṇḍ. 1, para. 19. He escapes this duty if he proceeds immediately from his studentship to a life of ascetic meditation. See Phil. of the Upanishads, Chap. IV.

(e) Vasishṭha, Chap. X.

(f) Āpast. Pr. II. Paṭ. 9, Khaṇḍ. 21, paras. 8, 10, 19.

(g) See Mit. Chap. II. Sec. VIII. paras. 2, 8; 2 Str. H. L. 248.

(h) See Steele, L. C. App. B.

(i) Datt. Chand. Sec. II. 32, IV. 1 ss.; Vyav. May. Chap. IV. Sec. V. para. 21; Steele, L. C. 47. An adoption once concluded is indefeasible. Amongst Brāhmins the homa sacrifice marks the completion of the ceremony. Steele, L. C. 184.

his adoptive parents. (a) He exchanges "the gotra" of his real father for that of the adoptive father as a woman enters her husband's gotra by marriage. (b) He learns the sacred invocations in his family of adoption, and in the absence of a son by birth completely takes his place. (c) His right of inheritance as the son of his real father perishes, (d) at the same time that he acquires the same right as son of his adoptive father. (e) Yet in the latter capacity his right is so far defeasible that the birth of a son reduces him to one-fourth of a share, (f) as compared with the full share taken by the begotten son. (g)

According to most of the authorities (h) the severance of the boy from his own family is effected according to the Hindû law by the requisite ceremonies, even though on account of a difference of caste or some other insuperable obstacle he cannot be initiated in the family of adoption. (i) In such a case he is regarded like a child uninitiated as being only of the rank of a dâsa (slave) or a sūdra. (j) He is entitled to maintenance, but does not inherit. (k)

(a) *Lakshmi Bai v. Shridhar Vasudeo Takle*, I. L. R. 3 Bom. 1.

(b) Smṛ. Chand. Chap. X. paras. 13, 14.

(c) Vyav. May. Chap. IV. Sec. V. para. 21. An adopted son fully represents his father in a partition of property after the father's death. Smṛ. Chand. Chap. X. para. 18.

(d) Steele, L. C. 186; Smṛ. Chand. Chap. X. paras. 14, 15.

(e) Vyav. May. Chap. IV. Sec. V. 21—23; Steele, L. C. 47, 407.

(f) Vasishṭha XV. 9; Vyav. May. Chap. IV. Sec. V. para. 25; Steele, L. C. 47. The proportions vary according to caste custom, *ib.* 186, 387.

(g) See above, p. 365. The begotten son takes precedence, and where primogeniture prevails is entitled to the advantages of the firstborn, Steele, L. C. 186, 387.

(h) Vyav. May. Chap. IV. Sec. V. para. 16.

(i) Steele, L. C. 46.

(j) Baudh. I. Khand. 3, 6, 12; Coleb. Dig. Bk. V. T. 182, 273, Comm. See below "CONSEQUENCES OF ADOPTION."

(k) Datt. Mīm. Sec. II I. 3.

The caste customs are more liberal than the books to the boy defectively adopted. Where an adoption has failed, either through the unfitness of the persons or defect in the process, they simply annul the relation supposed to have been constituted, with the effect apparently of restoring the adopted son to his family of birth. (a) It might be supposed that in some cases difficult questions would arise out of

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(a) Steele, L. C. 338.

According to the Roman law an adopted son became a member of the group of agnates to which his adoptive father belonged. This was because agnation rested on a conceivable dependence on a single head of the family. Cognation on the other hand rested essentially on connection by blood. Hence the adopted son retained his cognate relation to his family of birth and did not acquire such a relation to his family of adoption except the agnates. The husband was an *affinis* of his wife's cognates and she to his, but the cognates had no affinity *inter se*. The adopted son acquired no affinity to his adoptive family; much less therefore did he gain any such relation to the family of his adoptive mother. "In adoptionem datus, aut emancipatus, quascunque cognationes adfinitesque habuit, retinet: adgnationis jura perdit. Sed in ea familia, ad quam per adoptionem venit, nemo est illi cognatus præter patrem eosque quibus adgnascitur: adfinis autem ei omnino in ea familia nemo est." Dig. Lib. XXXVIII. Tit. X. Fr. 4, § 10.

As the Roman wife married by the ancient forms came under the "manus" or full authority of her husband, she and her children were co-agnates. The free form of marriage was in the end the only one used, and then there was no agnation between her and her children; much less therefore between her and an adopted son. Mutual rights of inheritance between a mother and her children were established by special laws, and Justinian placed cognates on the same footing generally as agnates; but this did not extend the connection of the adopted son. Adoption indeed, as we have seen, was by the same legislator reduced almost to a form which left the adopted son still a member of his family of birth. (See Maynz, Dr., Rom. § 15, 304, 338.)

The influence of the Church made itself felt in this as in other spheres. It became customary to obtain a religious sanction to adoptions by a ceremony performed by a priest. This was supposed to induce such a relation that the impediments to marriage in the

the legal relations that had intermediately grown up, but the records of the Courts do not show that these have in practice produced litigation of any importance.

The blood connection of the adopted boy with his family of birth is still recognized for the purpose of prohibiting marriage with a relative within seven degrees. (a) Some have maintained that the same restriction arises in the family of adoption, (b) but the more general opinion perhaps is that this extends to only three degrees, (c) though

case of a real son were regarded as subsisting equally for the adopted son. This position was reached by successive steps like the other prohibitions which gained recognition in the early centuries of the Christian Church. The original significance of adoption was in the meantime continually declining, and at last Leo the Philosopher allowed even eunuchs and women to adopt at pleasure without the petition and endorsement which had previously been required. (*See* Zach. Jus. Græc. Rom, §§ 4, 23). But when the former legal importance of adoption died out the old associations connected with it died out too, and it fell into comparative desuetude until reconstituted under altered conditions in recent times as a means for satisfying the parental instinct. Codice Civile, Lib. I. Tit. VII.; Code Nap. § 343 ss. Comp. Civ. Co. of New York, Chap. II.

The nomination of grandsons or others as heirs by such documents as the one preserved by Marculfus (*see* Canciani, Leg. Barb. v. II. p. 228,) had little or no connection with the ancient law of adoption; and when the Feudal system was established, kings and over-lords naturally discountenanced adoptions which would deprive them of the advantages of reversion. In India adoption was too intimately connected with religion to be extinguished, but the ruling powers have usually insisted on their sanction being taken and on receiving reliefs in the form of nuzzarânâ or salâmi in return for recognition of the adopted heir. The right is recognized as belonging generally to grantors of inams. *See* Steele, L. C. pp. 182, 183, 386.

(a) Datt. Chand. Sec. IV. 7, 8, 9; Vyav. May. Chap. IV. Sec. V. para. 29; Steele, L. C. 27, 47. The prohibition extends to his great-grandson. *Ib.*

(b) Vyav. May. Chap. IV. Sec. V. paras. 32, 35.

(c) Datt. Mim. Sec. VI. 32.



for purposes of inheritance a connection is recognized to seven degrees (a) or even as far as in the case of a begotten son. (b) The adopted son takes that position relatively to the wife of his adoptive father as well as to the adoptive father himself. (c) Whether a connection arises between him and his adoptive mother's family of birth such as to engender mutual rights of inheritance has been controverted. The prevailing opinion is in favour of the existence of such rights. (d)

The change of status induced by adoption cannot be renounced. (e) The adopted son may, if he will, give up his right of inheritance, and if he positively declines to fulfil the duties of a son, the widow, it was said, may adopt another in his place. (f) But this does not restore him to his family of birth. (g) A complete adoption amongst the twice-born implies initiation as the adoptive father's son (h) and a conse-

(a) Vyav. May. Chap. IV. Sec. V. 34.

(b) The *Saṃskāra Kaustubha* and the *Dharmasindhu* limit the connection by the *Saṃskāras* performed in each family. A full connection to seven and five degrees exists where the *upanayana*, plus the preliminary rites have been performed; where only the one or the other, a connection extending to but five and three degrees. See above, pp. 116, 117; and Rao Saheb V. N. Mandlik's *Vyav. May.* p. 352. A sister succeeds to her brother by adoption as to one by birth; *Mahantappa v. Nilgangawa*, Bom. H. C. P. J. 1879, p. 390.

(c) Datt. Mim. Sec. VI. 53; Steele, L. C. 188.

(d) *Pudma Coomari Debi, v. the Court of Wards*, L. R. 8 I. A. 229; where however the term "relations" may perhaps be confined to blood relatives through the adoptive father.

(e) *Ruvee Bhadr v. Roopshankar*, 2 Borr. 713, cited and approved by Sir M. Westropp, C. J., in *Lakshmappa v. Ramava*, 12 Bom. H. C. R. at p. 388.

At Athens an adopted son was allowed to return to his family of birth, but only on condition of his leaving a son to represent him in the family of adoption. See Petit, *Leges Atticæ*, p. 141.

(f) *Verbadru v. Bae Ranee*, 2 Morr. 1, 3.

(g) Comp. Manu IX. 142; *Sreemutty Rajcoomaree Doses v. Nobcoomar Mullick*, 2 Sevestre 641 n.

(h) Coleb. Dig. Bk. V. T. 183 Comm.

quent severance from the sacra of the family of birth, which must devolve on the same person who takes the estate. (a)

An adopted son like a real son may take a share or compound for it, and part from his adoptive father. He thus becomes separated, but he does not lose his rights of inheritance. (b)

(a) Vyav. May. Chap. IV. Sec. V. para. 21.

(b) Steele, L. C. 185. See above, pp. 59, 340, 359.

We gain a more vivid conception of the extreme antiquity of the Vedas, and the social life of which they afford glimpses by considering that the stages in the constitution of the family which they and even the post-vedic literature present as still existing facts, had already for the most part been passed through by the Greeks and Romans at the remote beginnings of their history. Adoption had then already superseded amongst them the other modes of continuing the family, which at a still earlier time they had no doubt shared with the Brāhmanic branch of the race. In Sparta it is said that down to a comparatively late age the eldest brother taking the patrimony became lord of his brethren after the fashion commended by Manu, and sharing the scanty produce of a small estate with them, took one wife also for the whole group. (Polyb. Excerpt. Vat. XII. 6; Schöm, Ant. Gr., p. 214.) Sparta was the asylum of archaic traditions. Poverty was given as a reason for this custom, but the reason was probably one invented to account for what had existed from time immemorial, and which affords a mark by which to track the Greeks back to a time before the dispersion of the Aryan nations.

The legend of Draupadī is referred to in the Datt. Mīm. Sec. II. 49, to show that there is nothing anomalous in a boy's being the son at the same time of several fathers. This confirms the suggestion made above, p. 419 (h), which is also supported by such stories as the one recorded in Datt. Mīm. Sec. II. 45. The limited polyandry thus indicated was itself an amelioration of that implied in the female gentileship of Śūdras asserted by Śaunaka in Datt. Mīm. Sec. V. 18, and made a basis for the doctrine of the eligibility amongst the Śūdras of a sister's or daughter's son for adoption.

The survival of the more primitive institution in Malabar is referred to by Ellis in 2 Str. H. L. 167. In Puffendorf's Law of Nature, Bk. VI. Chap. I. will be found several references on this subject to the early travellers in India.

## SECTION III.

## THE CAPACITY TO ADOPT AND THE CIRCUMSTANCES UNDER WHICH IT MAY BE EXERCISED.

## A. 1.—ADOPTION BY MALES.

The first duty of the married Hindû householder is to beget a son. The nature and the stringency of this obligation have been discussed in the preceding Section. (a) But failing a son by birth, adoption becomes a duty incumbent on all males except ascetics and members of those castes which, as to this institution, have remained without the pale of ordinary Hindû law. The duty implies a capacity to adopt, and this is a general attribute of a Hindû, subject only to such qualifications and exceptions as arise from particular circumstances of mind, body, or estate, such as will presently be considered. The desire to make sure of a successor has led to several infringements of a purely logical development of the first principles of the law, and the faculty of adopting has been widened far beyond the religious need, for which its main purpose is to provide. Such irregularities occur in almost every system of law, and have to be dealt with in detail, as in the following paragraphs gathered from the native sources and the decisions of the Courts.

It has been observed (b) that the duty to adopt a son does not arise until the birth of a son becomes very improbable. It is not quite consistent with theory that the authority should exist without strict regard to the need, but custom has settled this point the other way, and it may be said that any sonless male, married or unmarried, if capable of legal acts, may adopt. (c)

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(a) See above, p. 902.

(b) Above, p. 905.

(c) See above, p. 918.

"In the ancient rule the adopter is spoken of only in the masculine. (a) A woman cannot perform a ceremony prescribed by the Vedas, and adoption requires the recitation of hymns. The *Samskārakaustubha* allows a woman to adopt, (b) the *Vyavahāra Mayūkha* does not, except with the permission of her husband or of his relatives." (c)

"The different opinions held on the subject of adoption should be applied to any case as they agree with the custom of the community, and with the *Śākhā* to which a *Brāhman* belongs." (d)

"A man may adopt a boy in his lifetime, or authorize his widow to do so after his death." (e)

Adoption is for the husband and not for the wife, (f) except by delegation as shown below. Adoption is primarily resorted to for the sake of securing a performance of the funeral rites of a man having no male issue, and to perpetuate his name. Inheritance follows, but it is a secondary consideration. (g) The religious obligation or the spiritual benefit raises a

(a) See above, p. 873. A husband putting away a worthy wife must endow her with one-third of his property, or if poor maintain her; but one element of her worth is that she have borne "an excellent son." *Vyav. May. Chap. XX. para. 2.*

(b) See *Bayabai v. Bala Venkatesh Ramakant*, 7 Bom. H. C. R. xiii. App.; above, pp. 864, 880.

(c) MS. 405.

(d) MS. 405. From the same answer it appears that in some castes (the *Bhātele*) adoption is not allowed while there is a male kinsman surviving.

(e) *Huradhun Mookurjia v. Muthoranath Mookurjia*, 4 M. I. A. 414; S. C. 7 C. W. R. 71 P. C.

(f) *Chowdry Padom Singh v. Koer Udaya Singh*, 12 C. W. R. P. C. 1; S. C. 2 Beng. L. R. 101 P. C.; S. C. 12 M. I. A. 350; *Bykant Mony Roy v. Kristo Soondery Roy*, 7 C. W. R. 392; *R. V. Venkata Krishna Row v. Venkata Rama Lakshami Narsayya*, L. R. 4 I. A. 1.

(g) *Bungamah v. Atchummaḥ et al*, 4 M. I. A. 1; S. C. 7 C. W. R. 57 P. C.

strong probability in an appropriate case in favour of an adoption. (a) The celebrity or perpetuation of the family name of the adopter is however recognized as a sufficient motive for adoption, even though there be in the caste a disbelief regarding the spiritual motives for an adoption. (b)

In one case it was ruled that an irregularly adopted son cannot adopt his wife's sister's son, so as to defeat the reversionary rights of a daughter and daughter-in-law of his adoptive father, who are alive. Otherwise it was said the adoption of such a relation may be made. (c) The first adoption however being of a daughter's son was invalid. The additional reason given that the adoptive father had a daughter was unfounded in law. His having a daughter-in-law would, according to some, indeed most, opinions, make an adoption by him improper if not impossible, even had there been no other objection. The pseudo-adopted son thus pretended to be taken into the family acquired no position in it, and an adoption made by him could not affect the devolution of the property. As a really adopted son he could undoubtedly have adopted so as to defeat the expectations of other heirs.

Adoption *pendente lite* is valid, though made to defeat a gift previously made. The adopter, it was held, was not under an obligation to the donee not to adopt. Even if a contract to this effect had been made, it was doubted

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(a) *Huradhun Mookurjia v. Muthoranath Mookurjia*, 4 M. I. A. 414; S. C. 7 C. W. R. 71 P. C.

Extreme old age, a wife past child-bearing, the apparent adoption of a boy, his death in the family of adoptive father, the need of such a son in a religious point of view, are, it was said, considerations that tend, when evidence is conflicting, to prove the fact of adoption.

(b) *Bhala Nahana v. Parbhu Hari*, I. L. R. 2 Bom. 67; the parties in this case were of the *Talabda Koli* caste; Datt. Mim. I. 9; Datt. Chand. I. 3.

(c) *Bae Gunga v. Bae Sheoshunkur*, Bom. Sel. Rep. 73.

whether such contract would affect the validity of the adoption. (a)

Adoption by an unmarried person is not prohibited by Hindû law. (b)

"A Brahmachâri (c) can adopt and transmit his heritable right to his adopted son." (d)

"An unmarried Brâhman may adopt." (e)

"A sonless widower may adopt." (f)

The decisions of the Courts agree with this opinion. Thus it was ruled that an adoption by a widower is valid. (g)

#### A. 1. 2.—IN RELATION TO PATERNITY.

A second son cannot be adopted during the life of the one first adopted (h) except by special caste custom, (i) unless

(a) *Rambhat v. Lakshman*, I. L. R. 5 Bom. 631. This ruling is not inconsistent with the legal principle that no son can set aside a valid alienation made prior to his birth or adoption. The adopted son was held bound by the donation.

(b) *N. Chandrasekharada v. N. B. Eahmana*, 4 Mad. H. C. R. 270. See above, p. 905 Note (d.)

(c) A Brahmachâri is a professed student of the sacred writings.

(d) *Gunnappa Deshpandee v. Sunkapa Deshpandee*, Bom. Sel. Rep. 202, 229 (2nd Edn.); Suth. Syn. Note 4; Coleb. Dig. Bk. V. T. 273.

(e) MS. 1670. As to adoption by an unmarried man, see above, p. 918.

(f) MS. 1677.

(g) *N. Chandrasekharada v. N. B. Eahmana*, 4 Mad. H. C. R. 270; *Nagapa Udapa v. Subba Sâstry*, 2 Mad. H. C. R. 367.

(h) Datt. Mim. Sec. I. para. 6; Steele, L. C. 45; 2 Macn. H. L. 200; 2 Str. H. L. 85; *Dase v. Motee*, 1 Borr. R. 75; *Yachereddy Chinna Basapa et al v. Y. Gowdapa*, 5 C. W. R. 114 P. C.

(i) Steele, L. C. 181, 183.

The Peshwa, it is said, received a present of some lakhs of rupees on one occasion for allowing a double adoption. *Ib.*

The existence of a daughter makes no difference. See *ex. gr.* the appointment in *Sri Raghunadha v. Sri Brozo Kishore*, L. R. 3 I. A. p. 156.

the son has been expelled from caste. (a) The expulsion even of a begotten son is held to warrant an adoption in his place.

The following opinions of the Śāstris fully recognize this principle.

“No one having a lawfully begotten son can adopt. (b) Nor one having an adopted son living.” (c)

The adoption of a son, while a son is living and retains the character of a son, is invalid. (d)

In Madras, a person having adopted a son married a second wife, and in conjunction with her adopted a second son, the first adopted being still alive. The second adoption was held valid. (e) But this cannot now be considered as law except where supported by special custom: the Judicial Committee indeed have said that it is settled law that a man having an adopted son living cannot adopt another. (f)

(a) Steele, L. C. 42.

(b) MS. 1659.

(c) MS. 1637. As to the invalidity of a plurality of sons sought by adoption, see above, p. 916. Yet one or two castes allow an adopted son for each wife, and traces of the same custom are pretty widely spread. See Note (e).

(d) *Joy Chundro Rase v. Bhyrub Chundro Rase*, 1 M. S. D. A. R. 1849, p. 461. A grandson obstructs adoption equally with a son. See above, pp. 905, 917, 918.

(e) See *Rungamah v. Atchumamah et al*, 4 M. I. A. 1; S. C. 7 C. W. R. 57 P. C.; Datt. Mīm. Sec. I. paras. 6, 12; Coleb. Dig. Bk. III. T. 295.

(f) *Gopeelal v. Musst. Chundraolee Buhajee*, L. R. S. I. A. 131; S. C. 11 B. L. R. 391 Pr. Co., 19 C. W. R. 12 C. R. approving *Rangamma v. Atchamma*, 4 M. I. A. 1. See above, p. 917. In 1 Str. H. L. 78 a second adoption is allowed, subsisting the first, but this is denied by Sutherland (2 Str. H. L. 85), though Jagannātha allows adopted sons of the several castes (various descriptions), Coleb. Dig. Bk. V. T. 308 Comm.

The Dattaka Mīmāṃsā, it is said, allows the adoption of a second son, living the first, with the consent of the first. (a) But the author plainly disapproves the doctrine though he cannot deny the instances afforded by the Purāṇic writings, and it cannot now be considered part of the law.

The death of the son first adopted does not render the adoption of a second son made in his lifetime a valid one. (b)

A second adoption on the death of the first adopted son without issue is good, (c) as a son in the situation of the first adopted son could not exhaust the whole of the spiritual benefit which a son was capable of conferring on his deceased father. (d)

A wife's pregnancy, though known, does not, it was said, prevent an adoption. (e)

"A second son may be adopted in place of one whose adoption was illegal." (f)

(a) MS. 1657. Passage not cited, but obviously Datt. Mīm. Sec. I. para. 12.

(b) *B. Camumah v. B. Chinna Venkatasā*, M. S. D. A. R. 1856, p. 20; *Veraprashya v. Santanraja*, M. S. D. A. R. 1860, p. 168.

(c) *Bungamah v. Atchummah et al.*, 4 M. I. A. 1; S. C. 7 C. W. R. 57 P. C.; *Shamchunder v. Narayani Dibeh*, 1 C. S. D. A. R. 209; *Huradhun Mookurjia v. Multhoranath Mookurjia*, 4 M. I. A. 414; S. C. 7 C. W. R. 71 P. C.; *Musst. Bhoobyn Moyee Debia v. Ramkishore Acharjee*, 10 M. I. A. 279; S. C. 3 C. W. R. 15 P. C.

(d) *Ram Soondur Singh v. Surbanee Dossee*, 22 C. W. R. 121. The adopted son simply takes the place of the begotten son, and his death is attended with the same consequences as that of the begotten son.

(e) *Nagabhushanam v. Seshamma Garu*, I. L. R. 3 Mad. 180, contrary to *Narayana Reddi v. Vardachala Reddi*, M. S. D. A. R. for 1859, p. 97. This decision is opposed to the general principle of adoption being a merely supplementary process to provide against oration, but practice, as will have been seen, has diverged from first principles in many instances.

(f) MS. 1665. "Illegal" here means void. *Comp. Lakshmappa v. Rdama*, 12 Bom. H. C. R. at p. 393, 397.



A. 1. 3.—FICTITIOUS CESSER OF PATERNAL AND  
FILIAL RELATION.

"The insanity of a man's son enables him to adopt, (a) or that of his adopted son." (b)

A. 1. 4.—EXISTENCE OF A WIDOW OF A SON OR  
GRANDSON.

"A father-in-law (son deceased) may adopt notwithstanding the existence of the daughter-in-law; but she cannot adopt without his permission (Brāhman)." (c)

"A father-in-law is competent to adopt after his son's death notwithstanding the existence of his daughter-in-law, but the preferable course is to allow her to adopt." (d) "The son adopted by her indeed even after an adoption by her father-in-law, succeeds to her property and that of her husband," though not apparently in the Śāstri's opinion to that of the husband's father. (e)

(a) MS. 1654; comp. Manu. IX. 169, and *see above*, pp. 905 ss.

(b) MS. 1702. The father is regarded as virtually sonless, seeing that the lunatic son cannot perform the requisite ceremonies for ensuring his repose in the other world, or satisfy the debt to the father's ancestors, *see above*, pp. 155, 579 ss. For the rules of the customary law as to the disqualifications of a son which justify adoption, *see above*, pp. 907, 908. It may perhaps be doubted whether under the present law expulsion from caste of itself causes such a moral death that the father of a man so expelled can adopt another, *see above*, p. 906; Steele, L. C. 185. The outcast may be restored, and unless there has been a formal and valid act of disinheritance (*above*, p. 585) he would claim the succession against the adopted son.

(c) MS. 1668. The daughter-in-law is obviously the proper person to adopt a son to her deceased husband and herself. According to the authorities which give her the right to adopt, the competence of her father-in-law would introduce rival claimants to succession and *sacra*. But her dependence makes the assent of her father-in-law necessary to her performance of a religious act, such as adoption.

(d) MS. 1660. *See below*.

(e) MS. 1666.

A. 1. 5.—CAPACITY IN RELATION TO AGE.

Though there is no exact restriction as to the adopter's age, it is inferred that he should not adopt until no hope remain of begetting a son. (a) But this cannot be regarded now as more than a simply moral precept, the age is really unlimited by law, (b) provided only it exceed that of the adopted son, (c) and the adopter has reached years of discretion. (d) The last restriction is uncertain. In the *Mankar* case (e) the Śāstris were asked at what age a man hopeless of offspring might adopt. One says at sixteen, another at twenty. Others say no precise time is fixed by the Śāstras, whence, probably, one replies that he may adopt when he pleases. Three of the nine sages insist strongly on all possible measures being first used to remove the disability, and one says that hope must not be abandoned or a son adopted until the proposed father has reached old age.

The principle stated above, (f) as to the imitation of nature, should prevent the adoption of a son at any rate by a boy under puberty; but this can hardly be stated with certainty as a rule of the positive law. Mr. Shāmacharn, in the *Vyavasthā Darpana*, seems to think that an adoption by a child between 8 and 15 may be good for religious, but not for civil, purposes; but the proposed severance seems inconsistent with the principles of the law of inheritance. It is opposed too to the principle laid down by Holloway, J., and apparently approved by the Privy Council, (g) that the validity of an adoption is to be de-

(a) Steele, L. C. 43. See above, pp. 902, 903, 905.

(b) *Ib.* 182, 383.

(c) *Ib.* 384; compare Cic. Pro. Domo. Ch. 13, 14.

(d) See above, p. 905 Note (d).

(e) 2 Borr. R. at p. 102.

(f) Page 884 (Note).

(g) *Sri Viradi Pratapa Raghunada v. Sri Brozo Kishoro Putta Deo*, 7 Mad. H. C. R. 301; 1 L. R. 1 Mad. 69; 25 C. W. R. 291, (C. R.) L. R. 3 I. A. 154, 193.

duced by the spiritual rather than by temporal considerations, that the substitution of a son of the deceased for spiritual reasons is the essence of the thing, and the consequent distribution of property a mere accessory to it.

Bengal Reg. X. of 1793, § 33, says that an adoption shall not be competent to a minor (a) of whose estate possession has been taken by the Court of Wards. The Sadr Court of Bengal held that this prevented the minor equally from giving a power to adopt. (b) In other cases the power to adopt may be given at the ordinary age of discretion. (c) The judgment last referred to discusses the evidence as to minority but does not expressly say that adoption by a minor is generally incompetent. No provision on this subject is made by Act XX. of 1864, which provides for the care of minors and the administration of their property in the Presidency of Bombay. Act IX. of 1875, fixing the age of majority in ordinary cases at eighteen, but in that of wards at twenty-one, does not affect capacity in relation to marriage or adoption.

“A man aged 20 may adopt.” (d)

#### A. 1. 6.—CAPACITY IN RELATION TO INTELLIGENCE.

An insane man may, it is said, adopt with the consent of his kinsmen. The adoption is generally made by his wife under an assumed authority sanctioned by the kinsmen or the caste. (e)

(a) Under 18, Reg. XXVI. of 1793, Sec. 2.

(b) *Anandmoyee Chowdrain v. Sheebchandar Roy*, S. D. A. R. for 1855, p. 218.

(c) *Jumona Dassya v. Bamasoondari Dassya*, 25 C. W. R. 235, I. L. R. 1 Cal. 289 (P. C.); S. C. L. R. 3 In. Ap. 72, citing *Rajendro Narain v. Saroda Soondaree Debia*, 15 C. W. R. 548. Whether adoption by a minor without consent of the Court of Wards is wholly void is questioned in *Musst. Anundmoyee Chowdhoo-  
rayan v. Sheeb Chunder Roy*, 9 M. I. A. 287.

(d) MS. 1623. See above, p. 905 Note (d).

(e) Steele, L. C. 43, 182, 382.

An adoption by a person in a state of insensibility (*i.e.* disturbed mind) from dangerous illness, by verbal declaration, without performance of the prescribed ceremonies, was held invalid. (a) The transactions of sick and dying men always call for close scrutiny, and the Judicial Committee have said that in a case of adoption or will by a dying man the jealous requisitions of the law as to the proof of acts of persons done *in extremis* are fully to be complied with. (b)

“The adopter must be able to ask for the son, to accept him, and to smell his head.” (c)

#### A. 1. 7.—CAPACITY IN RELATION TO BODILY STATE.

A person disqualified to inherit cannot adopt, and thus secure to a stranger the right to a share which is allowed to the natural born son. (d)

In case No. XX., under the head of Adoption in Macnaghten's Hindû law, (e) the Śâstri says a leper is incompetent to adopt. In case No. XXI. the Śâstri thinks competence may be regained by penance, and with this Macnaghten agrees; but as a leper in Bombay cannot qualify himself for inheritance, (f) neither it seems can he for adopting a son.

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(a) *Bullubkant Chowdree v. Kishenprea Dassee*, 6 C. S. D. A. R. 219.

(b) *Tayammaul v. Sashachalla Naiker*, 10 M. I. A. 429, 437.

(c) MS. 1662. The authority for the last mentioned ceremony is not quoted. In performance it resembles the uttering of a prayer or formula in a whisper. The smelling of the head (*aghrâna*) however is a mode of salutation used in receiving a child or younger brother after any prolonged absence. It is practised amongst some of the South-Sea Islanders. It may have become a part of the ceremony, through a real or supposed capacity thus to distinguish a member of one's own gotra. As to the extreme olfactory sensibility of some races, see Tyler's *Anthropology*, pp. 2, 70, and Letourneau's *Sociology*, p. 75.

(d) Mit. Chap. 2, Sec. 10, para. 11; above, p. 880.

(e) Vol. 2, p. 201.

(f) See above, pp. 576, 579.

An impotent man it is said cannot adopt, at least until his incapacity has been proved by marriage. (a) His religious duty no doubt is to beget a son if he can ; but the allowance of adoptions by bachelors and widowers shows that the religious obligation is not accompanied by a legal incapacity. A man who is blind, deaf, dumb, or diseased may adopt. (b)

#### A. I. 8.—CAPACITY IN RELATION TO RELIGIOUS STATE.

Adoption by one who has renounced the world and devoted himself to a life of study and asceticism ought not, according to theory, to be possible, but the restriction is now only speculative. (c)

Pollution from the death of a relative incapacitates during its continuance for adoption. (d)

“A person *in extremis* is not so affected with impurity by a death in the family as to be incompetent to adopt.” (e)

#### A. I. 9.—CAPACITY IN RELATION TO CASTE CONNECTION OR EXCLUSION.

A man degraded from caste cannot adopt (f) during his exclusion.

The *Mitāksharā* denies the capacity to adopt generally to a man himself disqualified for inheritance, (g) and specifies loss of caste in particular as a cause of disinherison. This ex-

(a) Steele, L. C. 43.

(b) Steele, L. C. 43.

(c) See above, pp. 559, 572, 934 ; *Āpast. Pr.* II, Pat. 9, Kh. 21, para. 19, Kh. 23.

(d) *Ramalinga Pillai v. Sudasiva Pillai*, 1 C. W. R. 25 Pr. Co. The periods of pollution vary with the caste and the nearness of relationship, as noticed above, p. 510 n. For Brāhmins the extreme time is 10 days, for Kshatriyas 12, for Vaiśyas 16, for Sūdras 30 days.

(e) MS. 1674.

(f) Steele L. C. 43, 182, 382.

(g) *Mit. Chap. II. Sec. X. para. 11* ; see above, p. 880.

tends equally to women as to men. (a) The only persons who can take the father's place in such cases are the legitimate issue and the son begotten on the wife by a kinsman. (b) The latter is not now recognized, so that the man born blind or deaf is deprived of all resource. Loss of caste is now declared by statute not to involve loss of inheritance, and by analogy the out-cast ought perhaps to have power to adopt, but the whole position of the out-cast retaining his heritable rights is so anomalous that no very confident opinion can be offered on this subject. (c) The questions that can arise out of it must be very few, as an out-cast could scarcely obtain a son in adoption.

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A. 1. 10.—IN THE CASE OF PARTICULAR CASTES.

In the case cited above, p. 924, the Śâstri said that a daughter-in-law could not adopt while the brothers of her deceased husband's father survived. (d)

A. 1. 11.—VAIŚYAS.

A Vaiśya, who has undergone the ceremony of *vibhūt vidā* is capable of adopting a son. The Hindū law does not expressly prohibit it. A contrary custom is to be proved by satisfactory evidence. (e)

A. 1. 12.—ŚUDRAS.

“An unmarried Śûdra may adopt.” (f)

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(a) *Loc. cit.* paras. 8, 9.

(b) Coleb. Dig. Bk. V. T. 334.

(c) Comp. the remarks above, pp. 906, 907, and Manu IX. 125, as to the precedence of the first-born son.

(d) MS. 281, but on this see the note *loc. cit.*

(e) *Mhalsabai v. Vithoba Khandappa*, 7 Bom. H. C. R. App. 26. “Vibhūt vidā” is a renunciation of worldly affairs and interests analogous to that prescribed by the Smṛitis for Brāhmanas, see Manu VI.; Gaut. III.

(f) MS. 1653. See above, p. 921.

## A. 1. 13.—JAINS.

The Jains generally submit to the Hindû law of adoption though denying important doctrines. Their capacity to adopt is therefore governed by the ordinary rules. (a)

## A. 1. 14.—BHÂTELES.

"The custom of the Bhâtele caste prevents adoption when there is a kinsman in existence." (b)

## A. 1. 15.—SANNYÂSIS AND GOSÂVIS.

"All classes may adopt with due ceremonies, Gosâvis included." (c)

A married Gosâvi took a boy (Talabda Koli) in adoption, on a promise to settle property on him. This was carried out by his widow about 30 years after the husband's death, and was disputed by his relatives, but was held sufficient. (d)

## A. 2.—ADOPTION BY A MALE—BY DELEGATION.

## A. 2.—1. BY MEANS OF WIFE.

"A woman may adopt with her (living) husband's order. (e) It is not lawful for her to do so without the permission of her husband." (f)

If the husband's death approaches the wife may obtain his permission and afterwards adopt as a widow. (g)

(a) See above, p. 901 note (h); below, Sec. III. A. 3.

(b) MS. 405.

(c) MS. 1678. See 2 Str. H. L. 133. Instances will be found below of adoptions by Prabhus, by Lingâyats and others; and also above, p. 365 ss.

(d) *Bhala Nahana v. Parbhu Hari*, I. L. R. 2 Bom. 67.

(e) Reply of a Śâstri in the *Mankar* case, 2 Borr. R. at p. 102.

(f) Reply of Śâstris of the Sadr Court in *Sree Brijbhokunjee Maharaj v. Sree Gokoolotsaojee Maharaj*, 1 Borr. R. at p. 211. See the *Viramitrodaya* and the *Dattakakaustubha* to the same effect, quoted in *Narayan v. Nana*, 7 Bom. H. C. R. at p. 159, and *Coleb. Dig. Bk. V. T. 273 Comm.* Also *Vasishtha XV. 5.*

(g) 2 Str. H. L. 88; MS. 1661. Such cases as these, though sometimes regarded as instances of delegation, are more properly referred to implied authority to adopt given to the widow.

## A. 2. 2.—BY MEANS OF WIDOW.

If a man begins the ceremonies of adoption, and dies before completing them, his widow, it was said, might complete them. (a)

## A. 2. 3.—BY MEANS OF DAUGHTER-IN-LAW.

In case of lunacy of a husband the wife of the lunatic may adopt with her father-in-law's sanction. (b)

The Śâstri in one case held a "daughter-in-law bound by her father-in-law's engagement that she should adopt" a specified sapinda. (c) This was after the father-in-law's death. It is not clear whether the adoption was to be to the promisor or to his deceased son. If to the former he could not properly thus deprive his dead son of his due śrâddhas, and the delegation was altogether questionable if meant to operate during the father-in-law's life; equally questionable as an attempt to bind the widow of his son after his death.

## A. 3.—RESTRICTIONS ON ADOPTION TO PERSONS DECEASED.

Spiritual benefits are not the only ground of adoption. The Jains recognize adoption though they do not practise the Śrâddha or Paksha ceremonies. (d) Adoption rests generally on the advantage of having a son to perform funeral rites, which the Jains deny. But though the Hindû law of succession is applicable to them, yet it cannot be further extended so as to allow adoption to

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(a) 2 Str. H. L. 88; MS. 1661. Such cases as these, though sometimes regarded as instances of delegation, are more properly referred to implied authority to adopt given to the widow.

(b) See above, Sec. III. A. 1. 6. As to adoption by a wife on behalf of a disqualified person, as an insane husband incapable of appointing her, see above, p. 908. She ought to adopt to her husband in the case in the text. Comp. *Ranjee Hurrees v. Thukoo Bae*, 2 Borr. R. 485.

(c) MS. 1682; *Y. Venka Reddi v. G. Subba Reddi*, M. S. D. A. Dec. 1858, p. 204.

(d) See above, p. 568.



dead parents or sanction the exercise of a power of adoption by another to dead persons (a) through a fictitious gift.

A son cannot, it was said, be adopted to the great-grandfather of the last taker after the lapse of several years, when all the spiritual purposes of a son, according to the largest construction of them, should have been satisfied. (b)

#### A. 4.—QUALIFICATIONS OF THE POWER TO ADOPT ARISING FROM FAMILY AND POLITICAL RELATIONS.

##### A 4. 1.—CONSENT OF WIFE.

A wife's consent to adoption by her husband is not indispensable to the validity thereof. (c) Adoption is the act of the husband alone. The wife may join in it, (d) and ought to do so for a full compliance with the religious law. (e)

The Poona Śāstris replied in the *Mānkar* case (f) that the husband ought to consult his wife on a proposed adoption, but that the right belongs to him alone.

##### A. 4. 2.—FAMILY RELATIONS—KINDRED.

The existence of brothers or other kinsmen does not affect a man's capacity to adopt. It is said, indeed, that in a few castes the parents or an undivided brother (g) may object to a particular adoption, and in many the assent of

(a) *Bhagvandas v. Rājmaḷ*, 10 Bom. H. C. R. 241, 265.

(b) *Musst. Bhoobun Moyee Debia v. Ramkishore Acharjee*, 10 M. I. A. 279; S. C. 3 C. W. R. 15 P. C.; Beng. S. D. A. R. 1856, p. 122. A narrower limitation exists as held in the case of Jains. See above.

(c) *Alank Manjari v. Fakir Chand*, 5 C. S. D. A. R. 356.

(d) See *Rungamah v. Atchummah et al*, 4 M. I. A. 1; S. C. 7 C. W. R. 57, P. C.

(e) Colebrooke says that according to the *Mitāksharā*, though the mother's consent may perhaps be essential to the gift, it is not to the taking of a son in adoption. Mit. Chap. I. Sec. XI. para. 9, note. See below, Sec. V, as to the gift.

(f) 2 Borr. R. at p. 102.

(g) Steele, L. C. 385, 386. The consent may be a necessary restriction when a minor proposes to adopt—especially the consent of his parents.

near relatives must be asked, (a) but it is not provided that their disapproval shall invalidate the adoption. (b) They must be invited to take part in the ceremony, and a son of a brother or other near relative is to be chosen by preference, but these obligations are of a simply religious character.

#### A. 4. 3.—PUPILLAGE.

The sanction of the Court of Wards is necessary to an adoption by a minor under its care. (c) Act XX. of 1864 makes no provision on this subject. It provides for the guardianship of a minor's person and the administration of his estate, but does not declare him generally incapable of jural acts. In the Bombay presidency therefore a boy under guardianship, but capable of religious acts, may possibly adopt or marry, though he may not deal with his property. (d)

#### A. 4. 4.—CONSENT OR ACQUIESCENCE OF THE SOVEREIGN.

"The writing of documents is insignificant (not essential). The Śāstras do not require the permission of Government to be obtained for an adoption." (e) But "they enjoin that a proposed adoption should be notified to the Government." (f) "The object of applying to Government is that it may continue to the adopted son Watans, &c., held from it. When the seat of Government is distant intimation may be made to the local officer." (g) Even notice to the ruling power is not necessary to validate an adoption, (h) but it is so usual

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(a) Steele, L. C. 183, 385.

(b) Steele, L. C. 45.

(c) See above, Sec. III. A. 1. 5, p. 947.

(d) See above, A. 1. 5; and below, B. 3.

(e) MS. 1675.

(f) MS. 1677, 1683.

(g) MS. 1711; 2 Str. H. L. 87.

(h) *Sutroogun Sutputty v. Sabitra Dye*, 2 Knapp, p. 287; S. C. 5 C. W. R. P. C. 109.

that an omission of it in an important case casts suspicion on the transaction. A want of sanction by the ruling power is not sufficient to invalidate adoption duly made with sufficient ceremonies. (a) The sanction of the ruling power to an adoption by a Kulkarni or his widow, or by a coparcener in Kulkarniship or his widow, is not necessary to give it validity, nor has Government a right to prohibit or otherwise intervene in such adoption. (b)

, In several cases it seems to have been supposed that the sanction of the Government was necessary to an adoption by a widow where it would not have been essential to an adoption by her deceased husband. (c) The authorities however on which the widow's power rests impose no such condition on its exercise.

Bombay Act II. of 1863, Sec. 6, Cl. 2, as to the non-recognition of adoption by a Court relates only to a question of assessability of land when raised between Government and the claimant by adoption. (d) It is not intended to regulate the enjoyment of an estate as amongst the heirs of the original grantee.

## THE CAPACITY TO ADOPT AND ITS EXERCISE.

### B.—ADOPTION BY FEMALES.

#### B. 1.—NO ADOPTION BY A MAIDEN.

The Hindû law imposes on parents the duty of getting their daughters married. It does not contemplate children as necessary to women on their own account. (e) Even

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(a) *Bhaskar Buchajee v. Narroo Ragonath*, Bom. Sel. R. 25.

(b) *Ramachandra Vasudev v. Nanaji Timaji*, 7 Bom. H. C. R. 26 A. C. J.; *Sree Brijbhokunjee Maharaj v. Sree Gokoolootsoojee Maharaj*, 1 Borr. 181, 202 (2nd Ed.); *Narhar Govind v. Narayan Vitthal*, I. L. R. 1 Bom. 607; *Huebutrao Mankur v. Govinrao Mankur*, 2 Borr. 75, 83 (2nd Ed.); *Alank Manjari v. Fakir Chand*, 5 C. S. D. A. R. 356.

(c) See below, B. 3. 36.

(d) *Vasudeo Anant v. Ramkrishna*, I. L. R. 2 Bom. 529.

(e) See above, p. 873; below, B 3. 13.

a married woman or a widow adopts only for her husband, and herself takes but an incidental benefit save under the exceptional custom allowing a *kṛitrīma* adoption to the woman alone in Maithila. For the unmarried woman there is no adoption ; nor in strictness for any woman except to her husband.

## B. 2.—ADOPTION BY A WIFE.

A wife only can receive authority to adopt (*a*) either as wife or as widow. She can adopt only as the representative of her husband, and under a real or assumed authority from him. This is generally admitted, (*b*) and is established by the following cases.

### B. 2. 1.—ADOPTION BY A WIFE UNDER EXPRESS DELEGATION.

In *Thakoo Bae Bhide v. Ruma Bae Bhide* (*c*) the Śāstris quote from Vasiṣṭha—"A husband's commands to adopt are required for a married woman, but for a widow to adopt without such command the permission of the father, or if he be not alive then of the (*jñāti*) relatives must be obtained."

The express authority of her husband is indispensable, if a wife adopts in his lifetime, in the Bombay Presidency. (*d*)

### B. 2. 2.—IMPLIED DELEGATION.

This arises in such cases as those of a husband beginning the ceremonies of adoption with the participation of his wife. In the event of his becoming helpless she may complete the adoption. Any unequivocal indication of his assent would probably be taken as equivalent to an express command. This may be gathered from the cases in the next sub-section.

(*a*) *Bhagvāndās v. Rājmal*, 10 Bom. H. C. R. 241.

(*b*) See *Ramji v. Ghamau*, I. L. R. 6 Bom. at p. 501.

(*c*) 2 Borr. R. at p. 492.

(*d*) *Narayan v. Nana*, 7 Bom. H. C. R. A. C. J. 153, 174 ; *Bayabai v. Bala Venkatesh*, 7 Bom. H. C. R. App. i. ; *Rangubai v. Bhagirthibai*, I. L. R. 2 Bom. at p. 380 ; *Ramji v. Ghamau*, I. L. R. 6 Bom. 498.

## B. 2. 3.—CONDITIONS OF EFFECTIVE DELEGATION.

The husband directing his wife to adopt must be in a condition with regard to freedom from loathsome disease, such that he could himself adopt. So also as to his relations to his caste. In case of insanity his assent or command is assumed by the rules of several castes, his place being taken by the kinsmen in controlling the choice made by the wife. (a)

A husband may authorize his wife to adopt a particular child, named by him, or a child selected by her. (b)

## B. 3.—ADOPTION BY A WIDOW.

"The permission expressed or implied of her deceased husband is requisite to enable a widow to adopt. An implied permission arises from a known intention of the deceased to adopt. Failing this she must obtain the permission of her father-in-law or other relative." (c) This permission is merely substitutive in default of any intimation by the deceased husband of his wishes. When he has clearly signified his wishes, these prevail over the wishes either of the widow or of the relatives, as shown further on.

The husband's sanction must have been given, according to the Mitâksharâ, as understood by Colebrooke, (d) because otherwise the adoption could not benefit him. But Colebrooke says the sanction may be replaced by that of the husband's kindred. (e) Ellis thinks that the prior assent of the husband may not be necessary amongst Śûdras ; but it must be either expressed or presumed.

The capacity of a widow to adopt must thus, like that of a wife, be drawn from a real or an assumed authorization on the part of the husband. If he has intimated a wish that there

(a) Steele, L. C. 43, 182.

(b) *Veerapermal Pillay v. Narrain Pillay*, 1 Str. R. 91; *Ry Sevagamy Nachiar v. Heraniah Gurbah*, 1 Mad. S. D. A. Dec. 101.

(c) MS. 1662.

(d) 2 Str. H. L. 91; so Ellis, *ib.*

(e) *Ib.* and Mit. Chap. I, Sec. XI. p. 9, notes.

should be no adoption none can be made. (a) If he has left no direction at all, there can, according to the Bengal law, be no adoption. According to the law of Bombay his assent may, in such a case, be assumed; but the widow's choice is controlled by the kinsmen, at least in a united family. (b) The consent or authority of the husband has been pronounced indispensable to an adoption by a widow after his decease, in Bengal, (c) in the N. W. Provinces, (d) and in Madras, (e) but in Madras it may now be replaced by the assent of the undivided members of the husband's family, as in Bombay. (f)

A widow in Bengal on the other hand cannot adopt without her husband's consent, even though his heirs consent to the adoption. (g)

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(a) *The Collector of Madura's case*, 12 M. I. A. at p. 443; *Bayabai v. Bila Venkatesh*, 7 Bom. H. C. R. at pp. xvii. ss. App.

(b) *Rámji v. Ghamau*, I. L. R. 6 Bom. at pp. 502, 503; *Collector of Madura's case*, 12 M. I. A. 397, 442.

(c) *Musst. Tara Mune Divia v. Dev Narayan et al*, 3 C. S. D. A. R. 387; *Huradhun Mookurjia v. Muthoranath Mookurjia*, 4 M. I. A. 144; S. C. 7 C. W. R. 71 P. C.; *Sutroogun Sutputtee v. Savitra Dye*, 2 Knapp, p. 287; S. C. 5 C. W. R. P. C. 109; *Musst. Bhoobun Moye, Debia v. Ramkishore Acharjee*, 10 M. I. A. 279; S. C. 3 C. W. R. 15 P. C.; *Juggodumba Debea v. Moneruth Mookerjea*, C. S. D. A. R. for 1858, p. 834; *Soorodhunnee Debea v. Doorgapersad Roy*, C. S. D. A. R. for 1858, p. 995; *Jummoona Dasya v. Bamasoondari D.*, I. L. R. 1 Cal. 289; *Musst. Sheboo Koeree v. Joogun Singh*, 8 C. W. R. p. 155 (a case of Kṛitrima adoption). See the Datt. Mim. Sec. I. para. 15; Colebrooke's Digest, Bk. V. T. 273; 2 Str. H. L. 84, 92, 96; 1 Macn. H. L. 66; 2 Macn. H. L. 175, 182, 189; Macn. Con. H. L. 125, 155, 158.

(d) *R. Haimun Chull Singh v. Koomer Gunsheam Sing*, 2 Knapp, 203; S. C. 5 C. W. R. P. C. 69; *Thakur Oomrao Singh v. Tha Mahtab Koonwar*, 2 Agra Rep. 103; *Jairam Dhama v. Musan Dhama*, 5 C. S. D. A. R. 3.

(e) *Veerapermal Pillay v. Narrain Pillay*, 1 Str. R. 91.

(f) *Shri Raghunadha v. Shri Brozo Kishore*, L. R. 3 I. A. 154, 191.

(g) *Raja Shumshere Mull v. Rancee Dilraj Konwar*, 2 C. S. D. A. R. 169.

Similarly an adoption by a widow was set aside for want of proof of authority for the adoption given by her husband, (a) in the N. W. Provinces. Adoption, without the husband's authority, gives to the adoptee, before or after the widow's death, no right to property inherited by her from her husband, (b) where this law prevails.

A son having died before his father, no custom of the family was shown to exist such that a widow could adopt a son under authority of her father-in-law. (c) The adoption was therefore pronounced void.

The rule however as to an express authority is, as the Judicial Committee have shown, less exacting than the Dattaka Mīmāṃsā declares. (d)

The existence of brothers is not an obstacle to adoption under an authority from a deceased husband. (e) A Hindū may execute an instrument giving authority to adopt when he has attained the ordinary age of discretion. (f) This the Judicial Committee seem to have considered the age of majority by law, which would now be eighteen years. (g) But if the capacity to give authority arises at the same time with the capacity to adopt, that would by some

(a) *Musst. Thakorain v. Mohun Lall*, N. W. P. S. D. R. N. S. Pt. I. 1863, p. 352.

(b) *Chowdry Padom Singh v. Koer Udaya Singh*, 12 C. W. R. P. C. 1; S. C. 2 Beng. L. R. 101, P. C.; S. C. 12 M. I. A. 350; *Musst. Oodey Koowur v. Musst. Ladoo*, 15 C. W. R. 16 P. C.

(c) *Musst. Ghylannee v. Nirpal Singh*, 8 N. W. P. S. D. R. N. S. 1853, p. 174; see *Bhagvandas v. Rajmal*, 10 Bom. H. C. R. 241.

(d) See below, B. 3. 1.

(e) 2 Macn. H. L. p. 180 (Chap. VI. Case 5); *Sri Raghunada's case*, *supra*, p. 959 note (f); below, B. 3. 1.

(f) *Jamona Dasya v. Bamasoonderai Dasya Chowdhrani*, L. R. 3 I. A. 72, 78.

(g) Act IX. of 1875, Sec. 3. The Act does not however affect adoption, *see* Sec. 2.

Hindû lawyers be fixed at the age when religious ceremonies in general can be fully performed. (a)

It seems that a state of indivision between a son and his father does not affect the validity of an authority given by the former. In the case of *Gobind Soondaree Debia v. Jug-godumba Debia* (b) the suit was on behalf of a son adopted on an alleged authority from a husband who had died nine years before his father. The authority was discredited, but the discussion shows that the Court thought that if genuine it would be valid. This has an important bearing on the right of the widow, where, as in Bombay, the assent of the deceased husband is presumed.

### B. 3. 1.—ADOPTION BY A WIDOW UNDER EXPRESS AUTHORITY GIVEN BY ACT *INTER VIVOS*.

An adoption thus authorized needs no sanction by the relatives. (c) A widow may adopt with the consent of her husband obtained before his decease or with that of his relations thereafter. (d)

An authority to adopt under the husband's hand, though not complete as a testamentary disposition, is yet evidence of a declaration of fact. (e)

Even in the case of the husband's long absence it was said by the castes in Poona and Khandesh that a wife could adopt only with the written authority of her husband. If

(a) See *Rajendro Narain Lahoree v. Saroda Sundaree Dabee*, 15 C. W. R. 543. The attempt to postpone the son's capacity beyond his attainment of majority approved in *R. Huroosoondery v. Coomar Kristonath*, 1 Fult. 393, would not now be sustained.

(b) 3 C. W. R. 66 ; S. C. 15 *ib.* 5 Pr. Co.

(c) See *Bhasker Bhuchajee v. Naroo Ragoonath*, Bom. Sel. R. p. 24 (1st Ed.) ; above, B. 3.

(d) *Ry Sevagamy Nachiar v. Heraniah Gurbah*, 1 Mad. S. D. A. R. 101 ; *Arundadi Ummal v. Kupumall*, 3 Mad. H. C. R. 283 ; *Collector of Madura v. Mutu Ramalinga Sathupatty*, 1 Beng. L. R. 1 P. C. ; S. C. 12 M. I. A. 397 ; S. C. 2 Mad. H. C. R. 206.

(e) *Brojo Kishoree Dassce for Rathamath v. Sreenath Bose for Jadonath* ; 8 C. W. R. 241 ; S. C. 9 C. W. R. 463.



the absence was so prolonged as to raise a presumption of death the wife might adopt as a widow. (a)

Amongst the Poona Brāhmans a widow, it was said, must have her husband's order, and must also consult his kinsmen. In other castes it was said the consent of the relatives and of the caste, in some that the consent of the relatives alone, would supply the place of the husband's order. (b) The leading doctrines on the widow's substitutionary power of adoption have been thus stated by the Judicial Committee :—" Mr. Colebrooke's note on the *Mitāksharā* (Chap. I. Sec. XI. Art. 9), which has been much discussed, clearly involves three propositions—First, that the widow's power to receive a son in adoption, subject to some conditions, is now admitted by all the schools of Hindū law except that of Maithila ; second, that the Bengal (or Gaura) school insists that the widow must have the formal permission of her husband in his lifetime ; third, that some at least of the other schools admit the adoption to be valid, if made by the widow with the assent of her husband's kindred. The first two propositions are admitted ; but it has been argued for the appellants that on the true construction of this note, Mr. Colebrooke's authority for the last proposition is limited to the Mahratta school, in which the treatise called the '*Mayūkha*' is the predominant authority. Balam Bhaṭṭa, however, whom he cites as an authority for a power of adoption in the widow, wider even than that expressed in the third proposition, was a commentator of the Benares school. And the several notes of Mr. Colebrooke at pp. 92, 96, and 115 of the second volume of *Strange's Hindū Law* seem to their Lordships to show conclusively that he considered the doctrine embodied in the third proposition to be common to the followers of the *Mitāksharā* in the Benares as well as in the Mahratta school, and as

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(a) Steele, L. C. 187. A written authority does not seem legally indispensable, *see* below.

(b) Steele, L. C. 47 187.

such to be receivable as the law current in the Zillah Vizâ-gapatam, which lies within the Northern or Andra Division of the Dravada Country."

"Again Sir Thomas Strange's statement of the law in his work, Vol. I, p. 79, is clear and unambiguous. He says: 'Equally loose is the reason alleged against adoption by a widow, since the assent of the husband may be given, to take effect (like a will) after his death; and according to the doctrine of the Benares and Maharashtra schools, prevailing in the Peninsula, it may be supplied by that of his kindred, her natural guardians; but it is otherwise by the law that governs the Bengal Provinces.'" (a)

According to the Benares (Mitāksharā) law it was said that the authority of a husband to a widow for adoption could not be replaced by that of his heirs after his death. (b) The Dattaka Mīmāṃsā, the Paṇḍits declared, prevailed over the works which allow a substitutive authority. (c) Mac-naghten held the same view; but Colebrooke maintained the sufficiency of the kinsmen's sanction, and his doctrine was approved by the Judicial Committee in the *Collector of Madura's* case. (d)

There is no stereotyped form of authority to adopt. (e) It may be given either orally or in writing. (f)

A deed, containing no words of devise, nor intended by testator to contain any disposition of his estate, except so

(a) *The Collector of Madura v. Muttoo Ramalinga Sathupatty*, 12 M. I. A. pp. 432-33.

(b) *Raja Shumshere Mull v. Ramee Dilraj Koonwur*, 2 C. S. D. A. R. 169.

(c) See Datt. Mīm. Sec. I. para. 16; Viramitrodaya, Transl. p. 116.

(d) 12 M. I. A. at p. 432.

(e) *Pritima Soondaree Chowdrain v. Anund Coomar Chowdhry*, 6 C. W. R. 133 C. R.

(f) 2 Str. H. L. 95, 96; *Gudadhur Pershad Tewaree v. Soondur Koomaree Debea*, 4 C. W. R. 116 Pr. Co.

far as that results from adoption of a son under it, is only a deed of permission to adopt, and not of a testamentary character. (a)

Defects in evidence relating to the execution of a deed authorizing adoption are less material than as to the disposition of a property by will. (b)

### B. 3. 2.—ADOPTION BY WIDOW UNDER AUTHORITY GIVEN BY WILL.

A will giving power to adopt is sufficient authority. (c)

A will of a childless Hindû, giving power to adopt, though opposed to the interests of the widow or of the next reversionary heirs of the testator, is not inofficious. (d)

A permission given for adoption of a boy as co-heir with a son cannot be converted into one for adoption after the death of the natural son. (e) It is really void from the first. (f)

### B. 3. 3.—POSITIVE COMMAND TO ADOPT.

When a husband has given a positive command, the widow's capacity to adopt appears in its strongest form as opposed to the wishes or interests of the kinsmen who will be affected by the adoption. (g) The only question that can be raised in such a case is that of whether adoption is compulsory. The duty does not seem to be doubted, but in recent times it has come to be regarded as one that the Courts cannot properly enforce or at least not within any particular

(a) *Musst. Bhoobyn Moyee Debia v. Ramkishore Acharjee*, 10 M. I. A. 279; S. C. 3 C, W. R. 15 P. C.

(b) *Jumoon Dassya v. Bamasondani Dassya*, 25 C. W. R. 235; S. C. L. R. 3 I. A. p. 72.

(c) *Sayanlal Dutt v. Soudamini Dasi*, 5 Beng. L. R. 362.

(d) *S. M. Sarroda Dossee v. Tin Cowry Nandy*, 1 Hyde R. 223.

(e) *Joy Chundro Race v. Bhyrub Chundro Race*, C. S. D. A. R. 1849, p. 461.

(f) *See Padma Coomari Deba v. Court of Wards*, L. R. 8 I. A. 229; and B. S. 3. below.

(g) *See* above, B. 3 and 3. 1.

time. (a) A widow directed by her deceased husband to adopt is bound to give effect to his wishes before she can claim under the deed of permission framed chiefly for the benefit of the son she may adopt. (b)

A direction cannot be carried out contrary to the law, as *ex. gr.* while a son of the husband is living. (c)

#### B. 3. 4.—CHOICE PRESCRIBED.

It is common for a husband authorizing an adoption to specify the child he wishes to be taken. (d) Should that child die or be refused by his parents the authority would still be held, at least in Bombay, to warrant the adoption of another child unless indeed he had said "such a child and no other." The presumption is that he desired an adoption, and by specifying the object merely indicated a preference. Whether the same rule would prevail in Bengal may be doubtful, as the presumption there is against an authority not clearly given.

A Hindû by will expresses a wish that his wife, after his death, should adopt the second son of a person, who had only one son born and alive at testator's death. The widow is not bound to wait indefinitely till the person begets a second son, but may adopt a boy of her own choice under the power. (e)

When a husband authorizes the adoption of a particular boy named by him, his widow or any of his widows (if there are more than one) cannot adopt any other boy so long as the boy thus designated is alive. (f)

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(a) See above, pp. 903, 904; and below, OMISSION OF ADOPTION.

(b) *Musst. Subudra Chowdryen v. Goluknath Chowdry*, 7 C. S. D. A. R. 143. See above, p. 903; and below B. 3. 15; B. 3. 37.

(c) 2 Macn. H. L. p. 199 (Chap. VI. Ca. 19); *Bhoobun Moyee's* case, 10 M. I. A. 279.

(d) See above, p. 904.

(e) *Veerapermal Pillay v. Narrain Pillay*, 1 Str. R. 91. See above, p. 904, Note (b).

(f) *Ramchandra v. Bapu Khandu*, Bom. H. C. P. J. 1877, p. 42. We may add "and not given in adoption." See below, Secs. IV. V.

When authority has been given to a widow to adopt the son of a particular person it is exhausted by his adoption. If he die it will not warrant another adoption to replace him. (a)

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#### B. 3. 5.—AUTHORITY GIVING QUALIFIED DISCRETION.

The husband sometimes defines the class out of which the adopted son is to be taken, and failing such, names another class without prescribing the individual to be adopted. The same principles of construction would probably be applied in this as in the last case.

An instance of a qualified discretion is to be found in the deed of permission given in *Musst. Bhoobun Moyee Debia's* case. (b) In this the selection of a son is directed to be made by preference from the executant's own gotra, but alternatively from another gotra.

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#### B. 3. 6.—AUTHORITY GIVING COMPLETE DISCRETION AS TO PERSON.

This is probably the most common form, and it has been held that under it the widow has a large discretion—or even an unlimited one—as to whom she will adopt or whether she will adopt at all. (c)

Such an unfettered discretion as to the boy to be adopted was granted by the Anumati patra, or authority executed by the husband in the case of *Kashee Chundree Mustofee*. (d) This is the case most analogous to the assumed permission under which a widow adopts in Bombay.

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(a) *Purmanand Bhuttacharuj v. Oomakunt Lahoree and others*, 4 C. S. D. A. R. 318; *Gour Nath Choudhree v. Anopoorna Choudhooorain*, C. S. D. A. R. for 1852, p. 332.

(b) 10 M. I. A. at p. 281. The same permission is conditional on the death of the son by birth, and provides for successive adoptions.

(c) See above, pp. 903, 904.

(d) C. S. D. A. Part I. 13 Summ. Cases. The widow, it was directed, was to adopt on attaining maturity.

**B. 3. 7.—AUTHORITY TO ADOPT WITH COMPLETE DISCRETION AS TO EXERCISE OF THE POWER.**

When a mere permission is given to adopt, should the widow think fit, the authority is complete, but according to the cases no obligation rests on the widow beyond the religious one to further her husband's welfare in the other world. (a)

**B. 3. 8.—CONDITIONAL AUTHORITY.**

According to the Hindû law, a widow who has received from her deceased husband an express power to adopt a son in the event of his natural-born son dying under age and unmarried, may, on the happening of that event, make a valid adoption.

Thus an authority to adopt, in case the son dies, is valid, it was held, according to the law of Bengal, (b) but a contrary decision was arrived at in Madras. (c) Without special power for a second adoption a widow cannot adopt a second son upon the death of a son first adopted. (d)

In *Purmanand Bhattacharaj v. Oomakunt* (e) the authority was an alternative one between a boy named, and a Brâhman boy in case there was a bar to the adoption of the former, and the widow having adopted a boy under the power, the boy died. She then adopted another boy, not coming within the above description, and the adoption was held illegal, as there was no sanction for the second adoption.

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(a) See 2 Str. H. L. 97.

(b) *Musst. Solukhna v. Ramdolal Pande et al*, 1. C. S. D. A. R. 324.

(c) *Pootumall v. Goolam Russool*, M. S. D. A. R. for 1854, p. 47.

(d) *Goverinath Chowdhree v. Anapoorna Chowdhraïn*, C. S. D. A. R. 1852, p. 332; *Purmanand Bhattacharaj v. Oomakunt*, 4 C. S. D. A. R. 318; *Sreemutty Dosse v. Taracharn Coondoo*, 1 Bourke, 48.

(e) 4 C. S. D. A. R. 318. The precise contingency specified must happen. *Mohundro Lall Mookerjee v. Rookminey Dabey*, Coryton's R. 42.

An authority to adopt, in case the son and mother disagree, will not operate. (a)

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### B. 3. 9.—IMPLIED AUTHORITY.

This arises when a husband has begun an adoption but has been prevented from completing it by death. In Bombay any distinct intimation of his wish for an adoption would probably be held sufficient to support an adoption proper in itself, but the kinsmen have still a right, in an undivided family, to a controlling voice as to the choice of the boy to be adopted. (b)

The adoption of a brother was begun by a husband, and completed by the widows. The widows were not permitted to question the adoption, nor the right of the adopted son to adopt his nephew as his heir after his death. (c)

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### B. 3. 11.—ADOPTION BY A WIDOW—AUTHORITY EXCLUDED BY PROHIBITION OR DISSENT OF THE HUSBAND. EXPRESS PROHIBITION.

The Judicial Committee recognizing the substitutionary character of the widow's function in adopting a son have declared her exercise of it impossible whenever a prohibition was to be gathered from the husband's language or conduct.

"It appears to their Lordships that, inasmuch as the authorities in favour of the widow's power to adopt with the assent of her husband's kinsmen proceed in a great measure

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(a) *Musst. Solukhna v. Ramdhol Pande et al*, 1 C. S. D. A. R. 324. Conditional grants are not favoured by Hindû law, and here the contingency provided for is one that should not be anticipated.

(b) *Ramji v. Ghamau*, I. L. R. 6 Bom. 498.

(c) *Ranees Rathore et al v. Q. Khosal Sing*, N. W. P. S. D. R. Pt. II. 1864, p. 465. In the cases quoted above, Sec. III. A. 2. 1, p. 952, the widows proceeded to complete the adoptions on an implied authority from their husbands, with whom they had taken part in the initial ceremonies.

upon the assumption that his assent to this meritorious act is to be implied wherever he has not forbidden it, so the power cannot be inferred when a prohibition by the husband either has been directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family which afford no plea for a supersession of heirs on the ground of religious obligation to adopt a son in order to complete or fulfil defective religious rites." (a)

Hence where there is a positive prohibition by the husband a widow cannot adopt, (b) nor where the husband's assent cannot be implied. (c)

Such an adoption will not affect his testamentary disposition in favor of his brother. (d)

### B. 3. 12.—IMPLIED PROHIBITION OR DISSENT.

"The Marāthā School of Hindū law permits the widow to adopt ..... provided [the husband] has neither said nor done anything which can be regarded as a prohibition to her or a refusal by himself when *in articulo mortis* to adopt."

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(a) *Collector of Madras v. Mootoo Ramalinga*, 12 M. I. A. at p. 443. "Although some of the Marāthā Schools may use the expression that the widow may adopt without the consent of the husband, this means simply without his express assent. The foundation underlying every adoption amongst Hindūs is the consent of the husband. The only difference between the Schools is that some require that it should be express, and that others are content with an implied assent, and are ready to imply it if he have neither said nor done anything inconsistent with such an implication." Per Westropp, J., in *Bayabai v. Bāla Venkatesh*, 7 Bom. H. C. R. xviii. App.

(b) *Bayabai v. Bala Venkatesh*, 7 Bom. H. C. R. App. i.

(c) See *ib.*; *Narayan v. Nana*, 7 Bom. H. C. R. 173 A. C. J.; *Ramachandra v. Bapu Khandu*, Bom. H. C. P. J. 1877, p. 42. See the Sāstri's opinion below, p. 970 note (c).

(d) *Janki Dibeh v. Sadasheo Rai*, 1 C. S. D. A. R. 197.



There is not any good authority for saying that any person, except the widow, can adopt a son on behalf of her husband. (a) She may adopt when her husband has not intimated his dissent, even without the consent of kinsmen, at least according to some of the authorities, (b) but this is properly limited in Bombay to the case of a divided family. (c)

Where a husband writes to the Collector that his daughters are his heirs, this may indicate a prohibition on the husband's part to adoption by the widow while the daughters live or their line continues. (d)

### B. 3. 13.—ADOPTION UNDER AN ASSUMED ASSENT OF THE HUSBAND.

From the preceding cases it will have been gathered that authority from the husband either express or clearly implied enables a widow to adopt. On the other hand his pro-

(a) Per Westropp, C. J., in *Bhagwandas v. Rajmal*, 10 Bom. H. C. R. 257. The son becomes hers, so that she is deeply interested, as well as the continuator of her husband's existence for this purpose.

(b) See above, pp. 864, 881.

(c) *Ramji v. Ghamau*, I. L. R. 6 Bom. at p. 503.

In the case of *Virubudru v. Basse Rane*, Morris R. Pt. II. p. 1, a question was put to the Śāstri of the Sadr Court as follows:—

“Can a widow of the Nāgar Brāhman caste adopt a son without having obtained the permission of her husband?”

The answer was—“If the husband forbade the adoption of a son, the widow could not adopt; but if he did not prohibit it, it must be understood that he assented to it. For it is commanded in the Shāstr that a person who has no male issue must adopt a son, and if the widow adopted under such circumstances, in the way required by the Shāstr, her act would be valid. Some law-books deny this right to the widow, but the greater number allow it. To give publicity to the adoption, it should be made known to the ruler, though if this was not done the adoption would not be invalid, if otherwise in accordance with the Shāstr.” See also *Abajee Dinkur v. Gungadhur Vasudeo*, 3 Morr. R. 420.

(d) *Collector of Madura v. Mutu Ramalinga Satherpatty*, 10 C. W. R. 17 P. C.; S. C. 1 Beng. L. R. 1 P. C.; 12 M. I. A. 397; 2 Mad. H. C. R. 206.

hibition or dissent, however intimated, so it be decidedly intimated, makes an adoption impossible. (a) The widow does not, except incidentally, adopt for herself, but for her husband. (b) The Marāthā doctrine of her capacity when no intimation of his will has been given by the husband rests on an assumption of his assent to what would be at once a duty and a benefit to him. The Śāstris have in several cases placed the widow's capacity on this very ground. (c) She continues subordinately the ideal religious existence of her husband, (d) and when he has not expressed his wishes may express them for him, (e) though owing to her dependence, subject to the approval and control of the surviving male members of the undivided family. (f)

The Śāstris, to a question put them by the Court in *Thukoo Bae v. Ruma Bae*, (g) replied:—"Kātyāyana also says—'A married woman (nāree) certainly must not act without orders,' which we conceive to mean, those of a father, husband, and son. However, a widow has the power of adopting even without the orders of her husband. A widow destitute of all three legal protectors, is mistress in her own right of the power both of giving and receiving."

The Vyavahāra Mayūkha distinctly declares that the law of Yājñavalkya as to the dependence of women bears on the

(a) See *Bhagvandas v. Rajnal*, 10 Bom. H. C. R. at p. 257; 2 Str. H. L. 91; *Chowdhry Padum Singh v. Koer Udaya Singh*, 2 Beng. L. R. at p. 104 P. C.

(b) *Ib.* Her spiritual interests are fully recognized, but are considered as bound up in his.

(c) See above, p. 970, note (c.)

(d) Above, pp. 88, 90.

(e) *Bhagvandas v. Rajnal*, 10 Bom. H. C. R. at p. 257.

(f) *Ramji v. Ghamau*, I. L. R. 6 Bom. at pp. 502, 503. The *Vtramitrodaya* contends strongly for the necessity of assuming the husband's assent, while it recognizes that the assent must be had of the brethren on whom the widow is dependent. Transl. p. 116.

(g) 2 Borr. 488.

wife as essentially dependent on her husband and only during her coverture. As a widow she may adopt without the command to which she is subject only as a wife. (a) In the *Mankars'* case (b) the Śāstris said a widow could adopt her husband's brother's son, but no one else, without her husband's authority. Of the nine Pandits consulted in the case (c) two say that the rule of the Dattaka Mīmāṃsā requiring the husband's express consent is the one generally followed, but that the *Saṃskārakaustubha* and the *Vyavahāra Mayūkha* have established for the Marāthās that a widow may adopt without her husband's order. Four say the order may be dispensed with. One says the adoption may be made with the consent of the husband's kindred and of the caste, or even without any order or consent at all. To this another adds "provided her husband did not say he wished to have no son adopted." In the two answers of the Śāstris which follow, the same vacillation may be noticed.

"A widow without her husband's permission may adopt with the sanction of some senior member of the family." (d)

"An adoption by a widow is not invalidated by want of permission from the deceased husband or his brother." (e)

Where there is no prohibition, there is a permission on the husband's part for a widow to give but not to take in adoption, according to the Bengal law. (f)

(a) Vyav. May. Chap. IV. Sec. V. p. 17, 18.

(b) 2 Borr. R. p. 104.

(c) 2 Borr. R. at p. 104.

(d) MS. 1674.

(e) MS. 1753. In this case the permission of the nearest relative, which in the previous answer was said to be necessary, is pronounced needless.

(f) *Tarini Charan v. Saroda Sundari Dasi*, 3 Beng. L. R. 145 A. C. J.; S. C. 11. C. W. R. 468; see Datt. Chand. Sec. I, paras. 31, 32, and Sec. V. below.

The consent or authority of the husband is not indispensable to adoption by a widow :—

In the Dravida country, Madras. (a)

In the Sarāogi Agarvāli caste of Jains. (b)

The Śāstras of the Jains authorize a widow to adopt without the sanction of her husband. The age for adoption extends to the 32nd year. (c)

The Śāstris in the Bombay Presidency have usually favoured the widow's unfettered power to adopt, as in the two following instances.

“ The widow of a member of an undivided family may adopt.” (d)

“ The widows of two brothers may severally adopt.” (e)

It has however been decided by a Full Bench of the Bombay High Court that a widow of a member of an undivided family cannot adopt without the assent of the members of the family who succeed on her husband's death. It is only when she takes, as widow, a separated husband's estate that she has unfettered authority. (f)

“ The daughter-in-law may adopt notwithstanding a prior adoption by her father-in-law.” (g)

(a) *Collector of Madura v. Mutu Ramalinga Satherpatty*, 12 M. I. A. 397; S. C. 2 Mad. H. C. R. 206; see next page.

(b) *Sheo Singh Rav v. Musst. Dakho*, 6 N. W. P. H. C. R. 382; Mit. Chap. I. Sec. XI. 9 note; 1 Str. H. L. 79; 2 Str. H. L. 92, 96, 115; Vyav. May. Chap. IV. Sec. V. 17, 18.

(c) *Maharaja Govindnath Ray v. Gulalchund et al*, 5 C. S. D. A. R. 276.

(d) MS. 1650. This means without sanction.

(e) MS. 1750.

(f) *Ramji v. Ghamau*, I. L. R. 6 Bom. 498. The previous cases are in this fully discussed. See below, 3. 23; 3. 25; 3. 33.

(g) MS. 1666; i. e. the widow may adopt to her own husband. But the son thus adopted would succeed only to his adoptive father's separate property. The adoptive father's interest in the joint estate merged on his death in his father's. Such at least is the doctrine favoured by the Courts. See references in note (f).

"A mother-in-law and then the daughter-in-law adopt different boys. The one adopted by the daughter-in-law is heir to her husband." (a)

"There being an adoptive mother and a widow of an adopted son, the former cannot adopt without special reason." (b)

Under the law which prevails in the Dravida country, a widow without any permission from her husband may, if duly authorized by his kinsmen, adopt a son to him in every case in which such an adoption would be valid if made by her under written authority from her husband. (c)

#### B. §. 14.—ADOPTION BY A WIDOW, A CONSCIENTIOUS OBLIGATION.

It follows from what has been said that the widow is bound in religion to adopt conscientiously with a view to the benefit of her deceased husband, not capriciously, or so as to spite the husband's family. If a suitable boy can be had she ought to adopt from the husband's gotra, as she is thus most likely to maintain the family sacra. (d) This obligation is not precisely a legal one, (e) but if the widow disregards it without reason and seeks to introduce an objectionable member into the family the kinsmen may interfere. (f). On the other hand they cannot properly refuse their assent to the dependent widow who desires to free her conscience and further her husband's happiness by a fit adoption. (g)

The obligation to adopt is one that cannot be legally and directly enforced even when an express authority or command

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(a) MS. 1761. See below, Sub-sec. 3. 23.

(b) Above, p. 405, Q. 22.

(c) *Rajah Vellanki Venkata Krishna Rav v. Venkatrama Lakshmi*, I. L. R. 1 Mad. 174; S. C. L. R. 4 I. A. 1.

(d) 2 Str. H. L. 98.

(e) See Sec. IV.

(f) See *Ramji v. Ghamau*, I. L. R. 6 Bom. 498.

(g) See above, pp. 864, 881; Steele, L. C. 45; *Rakhmabai v. Radhabai*, 5 Bom. H. C. R. 181 A. C. J.

has been given by the deceased husband, much less can it be enforced when no direction has been given. The widow is then left to the promptings of her own conscience and judgment alone. (a)

If a widow in a divided family adopts in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive, the adoption is good in the Marâthâ country, though without permission of the husband or consent of his kindred, (b) or even that of the co-widow. (c)

The widow adopting must be a free agent. Constraint or undue influence will vitiate the adoption. (d)

The observations of the Judicial Committee in the *Ramnâd* case to the effect "that there should be such evidence of the assent of kinsmen as suffices to show that the act [of adoption] is done by the widow in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive," were explained in the sense that "Nice questions are not to be entertained as to the motives of a widow making an adoption so long as they are not corrupt or capricious." (e)

### B. 3. 15.—TIME FOR ADOPTION BY A WIDOW.

The religious obligation under which a widow is placed by a direction to adopt makes it an imperative duty to fulfil her husband's purpose as soon as possible. But though inordinate delay has in one or two cases been considered a

(a) See above, pp. 903, 905.

(b) *Bhagvandas v. Rajmal*, 10 Bom. H. C. R. at p 257; *Râmji v. Ghamau* I. L. R., 6 Bom. at p. 501; *Thuckoo Baee v. Ruma Baee*, 2 Borr. 488 (2nd Ed.)

(c) *Rakhmabai v. Radhabai*, 5 Bom. H. C. R. 181 A. C. J.; *Rupchand Rakhmabai*, 8 Bo. H. C. R. 114 A. C. J. It is as incumbent on the sapindas to allow a widow to appease her husband's manes as it is on the co-widow to join in furthering this pious purpose.

(d) *Bayabai v. Bala Venkatesh*, 7 Bom. H. C. R. 1 App.; *Somasekhara v. Subhadramâji*, I. L. R. 6 Bom. 524, 527.

(e) *Raja Vellanki v. Venkata Rama*, L. R. 4 I. A. 1.

cause for preventing widows from reserving to themselves benefits in which they were intended to have only an incidental share, yet it cannot generally be said that promptness in adopting is more than a pious duty. On the other hand the capacity to adopt is not barred by limitation; it may be exercised virtually at any time during the widow's life.

The sooner adoption is made after the husband's death the better. (a) "A widow should adopt within a year of her husband's death." (b) The non-exercise however by a widow of the right of adoption for one year after her husband's death does not entitle his next heir to sue for his share, for during the widow's life he has no right to present possession. (c)

An adoption, 15 years after the husband's death, under his authority, was held good, (d) and even an adoption 20 years after the husband's death. (e)

The presumption against adoption arising from neglect by a widow to adopt for six or seven years after the death of her husband (the Raja of Nattore) was considered not so great as the presumption in favor of the Raja's having given power to adopt. (f)

#### B. 3. 16.—ADOPTION BY WIDOW—OF HUSBAND'S NEPHEW OR OTHER SAPINDA.

Religious feeling usually prompts a husband in giving authority to adopt to designate a nephew or a member of his gotra either individually or by class as the person for adoption. He may however designate a stranger as he might adopt a stranger, or he may leave the choice to his widow's

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(a) *Verapermal Pillay v. Narrain Pillay*, 1 Str. R. 91.

(b) MS. 1734.

(c) *Ramanamall v. Suban Annavi*, 2 Mad. H. C. R. 399.

(d) East's Notes, Case 10, 2 Morl. Dig. 18.

(e) *Musst. Anundmoyee v. Sheeb Chunder Roy*, 9 M. I. A. 287; S. C. Beng. S. D. A. Rep. 1855, p. 218.

(f) *R. Chundernath Roy v. Koor Gobindnath Roy*, 18 C. W. R. 221.

discretion. In the last case, and in what may in Bombay be deemed the similar case of no particular intimation of his wishes having been given by the husband, the widow, like the husband, ought to adopt from amongst nephews or near kinsmen. (a) The Śâstris, as has been seen, have been disposed to exempt her from control if she should take a nephew, but they have shrunk from pronouncing an adoption of a stranger duly celebrated invalid. The choice therefore, though subject to control, cannot be deemed legally limited to any particular family so long as it is made within the caste, and outside the offspring of sisters and daughters of the husband. (b)

### B. 3. 17.—ADOPTION BY WIDOW—AUTHORITY IN THE CASE OF TWO OR MORE WIDOWS.

Where there are two widows the husband may authorize both to adopt. In the absence of an order they ought both to concur in an adoption. But in case of difference the elder has the superior right; and the younger cannot, it would seem, adopt without her senior's authority, except in case of irregularity on the senior's part causing interference by the caste. (c) Thus the Śâstris say:—

“The eldest of several widows has the right to adopt. On her death or disqualification the right passes to the next widow in order of marriage. She is disqualified by leprosy.” (d)

“A man having directed an adoption, the elder widow may adopt against the wish of the junior.” (e)

“The senior widow of a Śûdra, though married by pāt, has a preferential right to adopt over the second though married

(a) Above, pp. 886, 913; Sub-sec. 3. 13.

(b) See further on this subject in the next Section.

(c) Steele, L. C. 48, 187; *Rakhmabai v. Radhabai*, 5 Bom. H. C. R. 181 A. C. J.; *Ramji v. Ghamau*, I. L. R. 6 Bom. at p. 503.

(d) MS. 1669. See above, p. 412, Q. 36.

(e) MS. 1656. An authority cannot be given to each of two widows to adopt so that there may be two adopted sons at once. See *Gosari Shree Chundraculee v. Girdharajee*, 4 N. W. P. R. 226.



by 'lagna,' the one ceremony conferring in that caste the same rights as the other." (a)

"The elder of two widows may adopt though the younger has a daughter." (b)

A husband gave directions to each of his two wives to adopt. After his death they divided the property. The elder gave away her share and died. The younger then adopted a son. The Śâstri said he might recover the aliened share from the donee. (c) In this case if the two widows, as is sometimes supposed, took a joint estate inalienable and vesting on the death of one widow solely in the other, the donee could not of course have taken anything as against the surviving widow. (d) This does not however seem to have been the view of the Śâstri. The performance of the Śrâddhas ought in his opinion to be provided for by adoption, and the fulfilment of the duty which was incumbent from the beginning of widowhood defeated the gift made at a later time and subject to the duty. (e)

Where the elder of two widows has assented to an adoption by the other she cannot herself adopt another boy. (f)

### B. 3. 18—ADOPTION BY WIDOW—CIRCUMSTANCES IN WHICH THE CAPACITY MAY BE EXERCISED.

These are generally the same as for the husband himself. The obstacles to adoption by the husband operate equally to prevent an adoption by the widow. For instance the

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(a) MS. 1655. See above, pp. 413, 417, 427.

(b) MS. 1734. The existence of a daughter does not in any case prevent an adoption.

(c) 2 Macn. H. L. 247, Case XL.

(d) Above, p. 103.

(e) The adoption of a son operates retrospectively as a renewal or continuance of the adoptive father's existence as to an estate held solely or jointly by the latter at the time of his death.

(f) *Ramchandra v. Bapu Khandu*, Bom. H. C. P. J. 1877, p. 43.

existence of a son, either begotten or adopted, or the deceased husband's having died outcast. The circumstances which bar, or are supposed to bar, adoption by a widow are more particularly considered below. Where the elder of two widows has adopted a son the other cannot during his life adopt another. (a) On the death of a son adopted by the senior widow under authority of her husband, the second widow may adopt a second son upon an independent authority from her husband. (b) The authority to make successive adoptions is considered below.

### B. 3. 19—ADOPTION BY A WIDOW—SON DECEASED SONLESS.

An authority to adopt is frequently conditional on the death of a son. It provides sometimes for the event of a first or second adopted son's replacement in the event of his death. In such cases, it has to be borne in mind, the husband has by no means an unlimited power of future disposition. The son, whether begotten or adopted, by his birth or adoption and initiation, acquires rights and becomes a source of rights, which are regulated and guarded by the family law so as not to be subject to indefinite modification at the will of any individual. The authority to adopt cannot be made a means of upsetting the law on which it rests. Where the husband has given power to a widow to adopt, on the death of a natural son, an adopted son, or one adopted by her, the widow can exercise the authority only when the son dies unmarried, or leaving no child or widow. (c)

(a) Steele, L. C. 48. See p. 977 (e).

(b) *Shama Chunder et al v. Narain Debeh*, 1 C. S. D. A. R. 209; contra *Narainee Debeh v. Hurkishore Rai*, 1 C. S. D. A. R. 39.

(c) *Musst. Bhobun Moyee Debia v. Ramkishore Acharjee*, 10 M. I. A. 279; S. C. 3 C. W. R. 15 P. C.; S. C. Beng. S. D. A. R. 1858, p. 122.

## B. 3. 21.—SUCCESSIVE ADOPTIONS BY A WIDOW.

Where the son dies unmarried and without having adopted, full effect can be given to the authority to adopt son after son without the embarrassment of competing rights, which must arise from a series of adopted sons leaving widows, each perhaps entitled to adopt. The difficulty that would arise in the latter case has been perceived by the Judicial Committee. In *R. V. Venkata Krishnarao v. Venkata Rama Lakshmi Narasaiyya*, (a) Sir J. Colville says: "It is not necessary to consider in what way successive adoptions operate. It is sufficient to say that the law has established that they may take place."

Where a widow adopted a second son, upon the death of an adopted son, the Court rejected the suit of the deceased owner's brother with reference to the uncertainty of the law, in respect of the right of the presumptive next taker after a Hindû widow, to a decree, declaring her adoption invalid. (b)

When not expressly prohibited, a widow may make a second adoption with the sanction of the kinsmen. If some kinsmen give sanction, and others withhold it from interested motives, and both these are equally related to the deceased, the widow can adopt, acting upon the sanction of those kinsmen who gave it. (c)

A second adopted son takes the place of the first, but only if the first adopted died without issue. (d) In an authority to adopt successively the condition "if necessary" must be understood. Where an authority had been given to a wife to adopt five sons in succession, and the son first adopted lived to perform all the sacra, it was held that on his death

(a) L. R. 4 I. A. 1; S. C. I. L. R. 1 Mad. 174.

(b) *Ry Brohmo Moyee v. R. Anand Lall Roy*, 19 C. W. R. 419.

(c) *Parasara Bhutar v. Rang Raja Whatar*, I. L. R. 2 Mad. 202; see also *Rakhmabai v Radhabai*, 5 Bom. H. C. R. at p. 191. This shows that the authority to give or withhold sanction is not a right of property, but simply a part of the religious and family law.

(d) *Shama Ohunder v. Narain Debeah*, 1 C. S. D. A. R. 209.

unmarried his mother could adopt to his father. (a) This may perhaps be justified on the principle that there was no widow of the adopted son to take a jointure of the sacra, but the retrogression of the right to adopt could not be carried further without introducing confusion. (b)

### B. 3. 22.—ADOPTION BY A WIDOW—SIMULTANEOUS ADOPTIONS.

As the existence of one son makes the adoption of another illegal, the attempt to adopt two sons at once has been pronounced invalid as to both. (c) It could indeed be no more regarded as generally possible than the simultaneous marriage of two or more wives under a law of monogamy.

### B. 3. 23.—ADOPTION BY A WIDOW—CIRCUMSTANCES WHICH BAR ADOPTION.

It follows from the delegated or substitutionary character of the widow's authority to adopt (d) that the impediments to adoption external to the husband which affect adoption by him equally affect adoption by the widow. And as she has to perform an act of intelligence of sacred import, she must in her own person satisfy the conditions requisite to make such an act effectual. The circumstances in which the power can or cannot be exercised have already been considered. Amongst these might have been placed the existence of vested interests as viewed from the negative side, but this recently developed doctrine having been usually discussed by the Courts with reference to its positive operation as a bar to adoption or as depriving adop-

(a) *Ram Soondur Singh v. Surbanee Dossce*, 22 C. W. R. 121 C. R.

(b) See below B. 3. 23 ; B. 3. 25.

(c) See *Gyanendro Chunder Lohiri v. Kalla Pahar Hajee*, I. L. R. 9 Calc. 50 ; *Monemonthonauth Day v. Ouauth Nauth Day*, Bourke's R. 189 ; *S. Siddesory Dosee v. Doorgachurn Sett*, Bourke 360 ; *Bhya Ram Singh v. Agur Singh*, 1 N. W. P. H. C. R. 203 ; *Senkol Tevan v. Aurla-nada Ambalakaran*, M. S. D. A. R. for 1862, p. 27.

(d) See 2 Str. H. L. 88, 91, 92, 94.

tion of its usual consequences, will be here treated from the same point of view.

The principle now generally accepted by the Courts that a widow cannot adopt so as to defeat a vested interest (a) is not to be found in that form in the Hindû authorities. (b) It has been taken in two senses: (1) that the adoption under such circumstances is void, and (2) that though not void its regular effects are limited so as not to divest the vested estate. There has been a difference of views also as to whether the husband's authority does or does not make the rule inapplicable. It is almost inevitable that an adoption by a widow should cause some loss to kinsmen or contingent reversioners, and the principle has again been varied so as to make the consent of the parties thus interested or of a majority or of some of them necessary. (c) In Bengal the widow takes a life estate though not more even in an undivided family. If she adopts under a license from her husband she deprives his brethren of the succession. In Bombay she takes the succession only in a divided family, but an adoption by her defeats the estate which otherwise must go to the heirs next in succession at her death. She may have a daughter or a daughter's son taking, according to the prevailing theory, from her deceased husband. It is inconsistent with the theory of her position as not being a source whence succession is derived that she should have a power of defeating at her pleasure that succession which the law approves, but this has by the decisions been conceded to her.

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(a) See *Rupchand v Rakhmábái*, 8 Bom. H. C. R. 114.

(b) A mere descent cast makes no difference except when a son has taken the estate and left a widow. A right so devolved cannot be displaced by an adoption even under an express authority from the deceased son's father by his mother. See *Bhoobunmoyee Debia's* case, 10 M. I. A. 279, quoted in *Rajah Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi Narsayya*, L. R. 4 I. A. at p. 9.

(c) See *The Collector of Madura v. Muttu Ramalinga Sadhupatty*, 12 M. I. A. 397; *Sri Raghunada v. Sri Brozo Kishoro*, L. R. 3 I. A. 154, 191, 192; *Ramji v Ghamau*, I. L. R. 6 Bom. 498, 501.

The adoption of a son operates retrospectively. (a) He is looked on in the light of a posthumous son, and though a widow cannot adopt with the consequence of giving effect to a fraud, (b) yet there is nothing unreasonable in the loss of an estate divested by an adoption when the estate has from the first been subject to that kind of defeasance. The defeasance arises from what is in theory a deferred act of the deceased adoptive father, who could always have adopted had he lived, and whose spiritual life is continued by his widow.

In *Bhoobunmoyee Debia's* case the divesting of an estate was put forward by Lord Kingsdown rather perhaps as an illustration of the inconvenience that would arise from adoptions creating new collateral heirs than as a thing in itself impossible under the Hindû law. (c) In other cases the inconvenience has been made a ground for a supposed prohibition. (d) It is true that in many instances the supposed prohibition coincides in its operation with the actual principles of the Hindû law as drawn from the native sources, but in others it does not. It is desirable therefore that these principles and their bearing on the matter in question should, if possible, be ascertained and established. The sacra of a Hindû family are regarded as descending regularly with its estate from father to son for ever. The birth and the initiation of the son make him the joint or the sole depository of this group

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(a) The common statement has been adopted. Its proper sense is that an adopted son is regarded as a continuator of the adoptive father's personality as to his property and sacra whether separate or in a united family. The adoption is not retrospective for the purpose of enabling the son to take back a property which his father had not, and which between the father's death and the adoption has been given by the law to some other separated relative or branch of the original family.

(b) See above, pp. 366, 367.

(c) See also *Sri Raghunadas's* case, L. R. 3 I. A. at p. 193.

(d) See *The Collector of Madura's* case, 12 M. I. A. 397; *Rupchand v. Rakhmabai*, 8 Bom. H. C. R. 114; *Kally Prosono Ghose v. Gocoolchandra Mitter*, 1. L. R. 2 Calc. 307.

of connected rights and obligations. He is bound to provide for his father's śrāddhas : he is entitled to the due performance of his own. The proper celebrant is a son begotten or adopted ; but if the estate passes to a remoter heir the duty goes with it. The last holder,—though no ceremonies are so effectual as those performed by a son,—yet receives such benefit as is possible from the actual successor to the property. Now by an adoption higher in the line this blessing is lost. The son adopted for instance by the mother of one deceased performs a father's śrāddhas for his ceremonial father, but not for his ceremonial brother. The latter is thus, according to Hindû sentiment, placed in a worse position than if there had been no adoption at all. If the deceased have left a widow, it is she alone who, as partner during his life of his sacra, and capable of continuing them after his death, can in accordance with theory adopt a son. The son is her son as well as her husband's. Even in his life both ought to concur in an adoption. The books say nothing of a husband, even in his life, authorizing an adoption by any one but his wife, and Sir M. Westropp was fully warranted in stating that there is no authority for any one but the widow to adopt a son to her husband after his death. (a) She only could legally have joined in procuring the son by birth who is replaced by the adopted son, and the imitation of nature thus points her out as solely endowed with the faculty of adoption when her husband can no longer exercise it.

There are thus strong reasons, though the Sāstris seem in a few instances not to have sufficiently adverted to them, (b) why adoption by a mother to her son should be disallowed, (c) and why an adoption by her to her deceased husband should not be allowed to supersede the right of the deceased son's

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(a) *Bhagvandas v. Rajmal*, 10 Bom. H. C. R. at pp. 257, 258.

(b) See 2 Str. H. L. 93, 94, 95. See below Sub-sec. 3. 26.

(c) See above, Sub-sec. 3. 13.

widow. The reasons do not at all rest on a divesting of the junior widow's estate, but the preservation of her estate is incident to her exclusive faculty of adoption. If the view here taken is correct, a mother succeeding to her son after the son's investiture (upanayana) is not the more capable of adopting a son to him because she divests no estate but her own, but a case to the contrary is referred to below. (a)

There are cases however in which an only son or an adopted son dies still an infant. Such a one must usually have died unmarried. If he had advanced to the *saṃskāra* of marriage (b) he must have gone through the preceding ceremonies requisite to qualify him for performing the *śrāddhas* of his ancestors according to the rules of the caste and the family. His competence in this respect he must, in the absence of a son, have imparted in a measure to his wife, who has taken a jointure of his ceremonial virtue. (c) But death before marriage is not attended with these effects. The infant dying before tonsure is not entitled even to a ceremonial funeral. Until investiture the son of a twice-born man is but once born, and needing the religious second birth ranks only as a *dās* or slave entitled to subsistence and mundane benefits, but not yet sharing, or not fully sharing, the spiritual heritage of his family. (d) As then the *sacra* have never fully devolved on such a boy they may be conceived as still vested (so to speak) in his mother, whose spiritual representation of her deceased husband has not been replaced by that of his son. She may then adopt a second and a third son should the first and the second

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(a) *Bykant Monee Roy v. Kisto Soonderee Roy*, 7 C. W. R. 392 C. R. See the remarks of Melvill, J., in *Rūpchand v. Rakhmabai*, 8 Bom. H. C. R. at pp. 118, 123 A. C. J.

(b) See above, p. 873.

(c) See *Moniram Kolita v. Kerry Kolitany*, L. R. 7 I. A. at pp. 146, 148; above, pp. 90 ss.; *Vijjarangam v. Lakshuman*, 8 Bom. H. C. R. at p. 258.

(d) See above, p. 922.



never have attained ceremonial competence. (a) If the son have reached this stage it does not appear that the sacra and the faculty of adoption can revert to the mother. (b) Along with the spiritual capacity the responsibility also has finally centered in the son. (c)

When the deceased husband has died as a member of an undivided family the faculty of adoption is still peculiar to the widow. But as a consequence of her general dependence she cannot exercise this faculty without the approval of the kinsmen, (d) except where that approval is improperly withheld. (e) The sanction is not necessary where the husband has given her authority to adopt, and especially where he has himself designated the boy for adoption. In such a case the vested interests of the kinsmen are displaced by the adoption, whether they approve it or not. (f) This shows that the need of their sanction does not arise from their rights in the property but from their family relation to the widow. Their authority may be likened to that sometimes given to a girl's guardian under the English law to give or to withhold his sanction to her marriage. This, though its exercise may greatly affect his own fortune, is not a right of the guardian which he is at liberty to use for his personal enrichment. He is bound to use it conscientiously, and failing to do so he may be

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(a) See *Rajah Vellanki Venkat Krishnarav v. Venkatrama Lakshmi Narsayya*, L. R. 4 I. A. at p. 9.

(b) Judic. cit.

(c) See *Musst. Bhoobunmoyes Debia v. Ramkishore Acharji Chowdhry*, 10 M. I. A. at p. 310.

(d) *Shri Raghunatha v. Shri Brozo Kishore*, L. R. 3 I. A. 191.

(e) See *Rakkmbai v. Radhabai*, 5 Bom. H. C. R. 181, 188; above pp. 864, 881.

(f) See *Sri Raghunada v. Sri Brozo Kishore*, L. R. 3 I. A. 154, 173; *Dinkar Sitardm Prabhu v. Ganesh Shivaram Prabhu*, I. L. R. 6 Bom. 505; *Govind Soondaree Debea v. Jugganunda Debea*, 3 C. W. R. 66; 15 I. A. 5 Pr. Co., where the inquiry into the fact of the authority would have been needless unless it would operate if proved. St. L. C. 176.

superseded. So the Hindû kinsmen must not withhold their assent to an unobjectionable adoption merely because it will introduce another sharer of the estate. (a) The widow is bound (at least religiously) to seek a son within the family. When she does so the family is not in any way impoverished by the adoption, but if she is forced to go out of the family for a son the kinsmen have still not a right of property to exert or to forego, but a faculty to exercise, (b) which they must use to the advantage of the family at large, but especially of the deceased member. Such a sanction it has been held is sufficient as affords a reasonable guarantee that the widow has acted with moderate prudence and conscientiousness. (c) If the sanction were a right resting on property the infant co-members would have to be consulted through their guardians, and might have a right to disapprove at a later period what had been improvidently allowed in their infancy, but no provisions to this effect are found in the law-books.

The son united with his father may have died childless before him. His joint interest in the property and the sacra then reverts to the father, who may adopt a son and make him heir as he might have begotten a son. In such a case, as the deceased never had an independent right, being unseparated from his still living father, his widow cannot adopt without the sanction of her father-in-law. On the other hand the father-in-law, who has sanctioned an adoption by his son's widow, and thus given himself a grandson, cannot afterwards adopt a son. If he first adopts a son to himself he may still sanction an adoption to his deceased son. If he dies without either adoption having been made it might seem that the right would pass rather to his widow, should he leave one, than to his daughter-in-law. The replies of the Śâstris

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(a) Above, pp. 864, 880, 904, 975.

(b) See *The Collector of Madura v. Moottoo Ramalinga Sathupatty*, 12 M. I. A. at p. 442.

(c) See *Gopal v. Naro*, 7 Bom. H. C. R. xxiv. App.; and *Rakh-mabhai's case*, *supra*.

however favour the right of the daughter-in-law even during the father-in-law's life, giving to her adopted son rights equal or superior to those of the son adopted by the father-in-law, (a) according to the earlier or later adoption of the latter. On the death of the father-in-law without adoption they prefer to his widow the widow of his son, by whose adoption the manes of both father and son may be appeased. (b)

Where two or more united brothers have died in succession and sonless the household sacra in which they were jointly interested must have devolved solely on the one who survived the other. In such a case the widow of the last deceased as a sharer, though in a minor degree, of his ceremonial virtue, and having with him in his life a joint capacity to adopt, according to the religious view, is the proper person to adopt to her husband, and so devolve the family sacra centered in herself. The wife of the predeceased united member however had with him a joint interest in the family sacra, though this was never so developed by his separation as after his death to give efficacy to her substitutionary acts on account of a new family. (c) The common sacra centre on the death of one in the surviving members of the united family: the widow is spiritually and temporally dependent, and cannot adopt without the assent of the brethren. If all have died, the widow of the last has succeeded, so far as a woman can, to the sacra of the family, but she has not a superiority corresponding to that of her husband over the widow of a predeceased member, and enabling her to approve or disapprove an adoption by that widow. (d) Such an adoption is, according to one view, no longer

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(a) See above, p. 371, Q. 13, to which the remarks in the text apply, and Sub-section B. 3. 13 of the present Section.

(b) See a decision to the same effect in Sub-sec. 3. 26.

(c) See above, p. 355.

(d) That a widow is subject to control only by near male relatives appears from the answer in *Thukoo Bae's* case, quoted above, p. 971.

feasible when no one is left to give the requisite sanction. Though a widow has the sole faculty of adopting to the deceased husband, this faculty cannot be exercised in a united family except with the assent of the male members. On their extinction the faculty is virtually gone.

According to the other and the approved view, the widow, by the death of her husband's former co-members of the family, is merely freed from a control which they might exercise for her good during their lives. She may then adopt at her own discretion, as no controlling power is attributed to the widow of one deceased member over the acts of another. (a) Nor is she subject to the control of an infant member incapable of discrimination. This view is the one more consonant to the doctrines of the *Nirṇayasindhu*, the *Saṃskārakaustubha*, and the *Dharmasindhu*, admitting that any sanction at all is necessary to adoption by a widow. The *Vyavahāra Mayūkhā* recognizes the need of a sanction while there are qualified persons present to give or withhold it but not otherwise. (b)

In a divided family the ties of mutual dependence and support are much less close than amongst united kinsmen. According to the doctrine of the *Mitāksharā* the widow of a separated member takes his estate in full ownership, and becomes herself, though in her husband's family, a new source of inheritance. (c) According to the now prevailing Bengal doctrine she takes only a life interest, but still during her life the estate is completely vested in her. (d) Thus there are no immediate interests to impede her freedom as to adoption. But the division of the once united family has been necessarily attended with a separation in the performance of the

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(a) See the opinion of the Śāstris in *Thukoo Bae v. Ruma Bae*, cited above in Sub-sec. B. 3. 13.

(b) See *Bayabai v. Bala Venkatesh Rāmākrant*, 7 Bom. H. C. R. App. xii.; *Vyav. May. Chap. IV. Sec. V. para. 18.*

(c) See above, pp. 324, 325, 505, 517, 780.

(d) Above, p. 96.

daily sacrifices and the other periodical rites, community in which is the central point of family union. (a) The husband who has once been a celebrant of the sacra for himself alone cannot have lost the capacity and the obligation except by the process of reunion. If as usual he has died separated his sacra pass to his son, and in default of a son to his widow, (b) who in her turn may impart the requisite faculty by adoption. As no one shares the sacra there is no joint interest on which an interference with her discretion can properly be grounded. (c) A tradition of the necessary dependence of women still exacts from the widow a decent regard for the interests and wishes of the family at large notwithstanding the partition that has taken place, but as on the one hand she cannot urge her connexion as a ground for a right to maintenance in distress, (d) neither can the kinsmen on the other hand urge it as a ground for legal control of her faculty of adoption. (e)

These considerations apply to the actual estate of the deceased husband, whether joint or separate. If the deceased husband had no ownership of an estate in question, either as being individually separate or as being a member of a branch separated from the one to which the estate belonged, it is obvious that he had no sacra which that estate was bound to sustain. He might, had he survived, possibly have come in as the nearest collateral on the extinction of the proprietary branch, but when in his absence another has succeeded, that other has assumed the whole of the sacra connected with the estate he has taken. (f) No participation in them belongs

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(a) See above, pp. 689, 851; *Sri Raghunád's* case, L. R. 3 I. A. at p. 191.

(b) Above, pp. 93, 258.

(c) See *Viramitrodaya*, Transl. p. 257.

(d) Above, pp. 236, 243.

(e) *Ranjee v. Ghaman*, I. L. R. 6 Bom. at pp. 502, 503.

(f) See the opinion in *Bamundass Mookerjia v. Mt. Tariner*, 7 M. I. A. at p. 188; and above, pp. 67, 368, 590.

to the widow of the predeceased which she can impart to a son by adoption. One separated collateral cannot therefore be ousted by an adoption made after his succession by another collateral's widow. Much less can any one representing the proprietary branch undivided in itself be thus superseded.

It accords with the views just stated that if a Hindû husband gives to his wife an instrument of permission to adopt, should she be left a widow, and if he has born to him a son, who survives him, and if this son dies leaving a widow in whom the estate is vested, the power of adoption given to the mother-in-law is incapable of execution and is at an end. (a)

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B. 3. 24.—ADOPTION BY A WIDOW—CIRCUMSTANCES  
BARRING ADOPTION AS IN THE CASE OF A MALE.

“A widow cannot adopt while a previously adopted son is alive.” (b)

A son by her co-wife prevents adoption by a widow equally with one born of herself. (c)

“The widow cannot adopt two sons, because the adoption of the first creates an immediate change of the essential condition of sonlessness.” (d)

The existence of an adopted son is a bar to another adoption (though under power from the husband), by a widow, as well as to one by a husband himself. (e)

A husband abandoned his wife, who became a Moorlee. By his second wife he had a son. The first wife adopted a son. This was held invalid. (f)

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(a) *Padma Kumari Debi Chowdhurani et al v. Jagatkishore Acharjia Chowdhri*, I. L. R. 8 Calc. 302 P. C.

(b) MS. 1664. See above, Sec. III. B. 3. 18; B. 3. 19.

(c) Above, p. 522.

(d) MS. 1671.

(e) *Gopee Lall v. Musst. Chundraolee Buhoojee*, 4 N. W. P. R. 226; S. C. in Appeal, L. R. S. I. A. 131, and 19 C. W. R. 12 C. R.

(f) MS. 113.

Adoption by a Hindû in concert with his senior wife, it was said, supersedes the original permission given by him to each of his two wives to adopt a son for each, unless after the adoption he expressly confirmed the permission to his junior wife to adopt. (a)

B. 3. 25.—ADOPTION BY A WIDOW—NOT TO DEFEAT  
A VESTED ESTATE.

Though the Hindû authorities do not furnish such a rule, it must now be accepted perhaps as a principle established, or at least strongly favoured by the decisions, that adoption cannot be made to divest or defeat an inheritance already vested. (b) The Hindû rule seems to be this, that when a deceased was an actual co-owner or sharer in interest in an estate in question, his son received in adoption whether by himself or by his widow, takes his place. When he was separated and the law has given the estate of his deceased relative to some one else, the succession having passed by his line, cannot be recovered, because there is no authority for taking the estate from the hands into which it has fallen. The same principle is applied in the case of a blind or dumb man's son. Such a man cannot be an actual coparcener. There is a rule allowing his son to take his place in a partition, but when once the partition has been made, the son subsequently born or adopted is not remitted to a right which did not subsist in his father. (c) The particular rule, like that giving an estate to the existing collaterals, is not accompanied by any proviso in favour of subsequently adopted sons. In a united family there is a

(a) *Goureepershad Raee v. Musst. Jymala*, 2 C. S. D. A. R. 136; *Macn. Con. H. L.* 181, 182; 2 *Str. H. L.* 61. The permission could not operate while the son actually adopted was alive.

(b) *Annammalî v. Mahbû Bali Reddy*, 8 *Mad. H. C. R.* 108; *Kally Prosonno Ghose v. Gocool Chunder*, 1 *L. R.* 2 *Cal.* 295; *Rupchand Hindumal v. Rakhmâbâi*, 8 *Bom. H. C. R.* 114 *A. C. J.* See the discussion above, *Sec. III. B. 3. 23*; *Gâyabâi v. Shridharâchârya*, *Bom. H. C. P. J.* 1881, p. 145.

(c) See *Bâpuji Lakshman v. Pândurang*, 1 *L. R.* 6 *Bom.* at p. 620.

remitter through the identification in interest of the son with his father who died a co-sharer.

A widow (having legal power to adopt from her husband) (a) cannot adopt so as to deprive or defeat an inheritance or interest already vested in a widow of a son, natural or adopted, who survived his father, (b) or in the son of such a son, (c) or in the heirs of the adoptee's grand-uncle by adoption, who had succeeded to the grand-uncle's property upon the death of his widow. (d) Where the estate has come down to the widow of the last male survivor of the husband's family prior to the adoption, (e) it might seem that an adoption by a widow of a previously deceased coparcener could not be made so as to defeat the vested estate. This however will depend on the different views discussed above. (f) A new line cannot be substituted by adoption to take what a natural born son would not have taken; (g) but there does not seem to be anything in the Hindû law to prevent his taking what a natural born son would have taken at the moment of his birth or of his father's death. In *Bhoobun Moyee Debia's* case the adoption was in itself invalid, but if it had been made by the widow of one brother or cousin after the estate had descended to the widow of another the right of the former to adopt to her deceased husband, which had always subsisted, would not, according to the prevailing Hindû notions, be extinguished by failure of the male members. It would only be freed from a condition arising from the widow's dependence while they lived. The only theory on which the prohibitive right of the widow of the last full owner can be sustained seems to be that the sacra along

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(a) i. e. where such power is essential.

(b) *Musst. Bhoobun Moyee Debia v. Bamkishore Acharjee*, 10 M. I. A. 279; S. C. 3 C. W. R. 15 P. C.; S. C. Beng. S. D. A. R. 1858, p. 122.

(c) *Thukoo Bae v. Ruma Bae*, 2 Borr. 488 (2nd Edn.).

(d) *Kally Prosonno Ghose v. Gocool Chunder*, I. L. R. 2 Cal. 295.

(e) *Gobind Soonduree Debia v. Juggodumba Debia*, 3 C. W. R. 66; S. C. 15 C. W. R. 5 P. C.

(f) Sec. III. B. 3. 23. And see above, p. 598.

(g) See *Musst. Bhoobun Moyee Debia's* case, 10 M. I. A. at p. 311.



with the estate centred in the widow's husband and centred in her, so that she is religiously bound to continue the family by adoption, and to retain the estate for the benefit of the son to be adopted. His adoption operating retroactively will make the estate devolve wholly upon him as the adoptive father's heir, and the adoption of a son by a widow of a predeceased member being made subject to the contingency of the adoption of a son to the last deceased may be deemed subject to the approval of the latter's adopted son as the male *sapinda* on whom she is dependent. The law books and the practice of the people do not however support such a theory as this: they rather allow and encourage an adoption by a widow duly authorized without sanction when there is no one to give or to withhold it, though an adoption made by the widow of a separated collateral after the estate has passed to another collateral, will not create for the adopted son an estate in possession inasmuch as his father had no more than a contingent interest. If the estate has passed to a collateral separated in interest it has passed for good as against a collateral who, when it passed, had no share or interest. (a) There is in the last case a break in the succession as contrasted with the ideal continuity of it amongst all the members of a united family. (b) A right of possession is kept alive by the widow's constant capacity to adopt, so as to blend an additional element retrospectively with the united family, but a mere possibility once extinguished cannot be revived. Thus adoption in a separate branch cannot divest the estate which the law gave to the then nearest collateral, and which has passed *unshar* to him who has it. But within a group of united branches the widow of one may adopt so as to divest another wholly or in part. (c) Much more, it would seem, may

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(a) Comp. above, pp. 580, 590.

(b) Above, pp. 67, 600.

(c) See *Sri Raghunadha's* case, L. R. 3. I. A. 154. It is not regarded as divesting any more than a birth after a long gestation would be so regarded.

widow of one united in interest with the last holder adopt so as to divest the estate that has passed to a mere collateral never united with the deceased. (a) The latter will necessarily be much more completely represented by a son of a united brother than by a mere collateral, whose own right may be that of an adopted son or have descended through an adopted son. In one case it has been held that the adoption by a widow could not give to the adopted son the position of a co-sharer with a united brother of her deceased husband. (b) The adoption would certainly need the sanction of the surviving brethren unless this should be improperly withheld. In the case cited as a precedent (c) a son had died before his father but leaving a widow who adopted a son thirty-five years after her father-in-law's death. She had recognized his nephews as members with him of an undivided family, and she could not adopt without their assent unless it were improperly withheld. (d) On the death of the son before his father his proprietary right had wholly merged in his father's. (e) He had never had separate sacra, and it might perhaps be contended that therefore the widow never had a right to adopt. (f) The Śāstris, however, recognizing the joint interest of the son in the estate and the sacra, and his claim to the due celebration of his Śrāddhas by a son favour this right of a predeceased son's widow. They do not think it excluded by the existence of a widow or a daughter of the father-in-law, much less by the existence of remoter heirs to whom the estate has passed away from the direct line of the deceased. (g) In the case of co-sharers standing on an equal footing the

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(a) This competition may arise in the case of a rāj or a vatan.

(b) *Govind v. Lakshmibai*, Bom. H. C. P. J. 1882, p. 12.

(c) *Gayabai v. Shridhara Charya*, Bom. H. C. P. J. 1881, p. 145.

(d) Above, Sub-sec. 3. 13.

(e) *Udaram Sitaram v. Ranu Panduji*, 11 Bom. H. C. R. p. 76, 86.

(f) See above, B. 3. 23.

(g) See above, B. 3. 13. pp. 970 ss.

Indian lawyers certainly do not recognize any obstacle to adoption by the widow of one as arising from the estate on his death having vested in the other, (a) nor apparently would the Judicial Committee (b) countenance such a doctrine.

Though a cousin cannot sue, as next heir, to set aside an adoption, he has a right to question it if he takes under a deed such an interest as may be affected by the adoption. (c)

An estate being once vested cannot, it was said, be divested by a subsequent adoption in a collateral line (d) even when the adoption has been prevented by the fraud of him who has taken the estate through the absence of an adopted son.

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**B. 3. 26.—ADOPTION BY A WIDOW—HER CAPACITY AS AFFECTED BY HER AGE.**

Generally a widow cannot adopt until she has attained maturity. (e) This is an instance of the imitation of nature which however is in some castes not closely adhered to. (f) In these there may be an earlier taking, but the celebration is postponed until the time of possible maternity. It shows

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(a) See above, B. 3. 13. They regard death "without male issue" (see p. 598) as not having occurred until the death of the widow makes adoption impossible.

(b) See *Sri Raghunadha's case*, *supra*.

(c) *Brojo Kishore Dassee v. Sreenath Bose*, 9 C. W. R. 463; S. C. 8 C. W. R. 241.

(d) *Nilcomul Lakuri v. Jotendro Mohun Lahuri*, I. L. R. 7 Cal. 178, referring to *Keshuv Chunder Ghose v. Bishun Pershad Ghose*, C. S. D. A. R. 1860, Pt. II. p. 340; *Kally Prosonno Ghose v. Gocool Chunder Mitter*, I. L. R. 2 Cal. 295; above, pp. 367, 368; and *Sri Raghunadha's case*, I. L. R. 3 I. A. 154. In the last case it will be noticed that subsequent adoption deprived of an estate an undivided brother in whom it had fully vested. See also Sub-sec. 3. 26. below.

(e) Steele, L. C. 48.

(f) Steele, L. C. 187.

how adoption is regarded as almost exclusively the husband's affair, that under an authority from him an infant widow may adopt. "A widow of 10 years, unshorn, and not yet arrived at puberty, may, in pursuance of her husband's wish or assent, adopt from another gotra, though there be a non-assenting undivided brother of the husband surviving." (a) By the usages of the sect of Sarogees, adoption at the age of nine years is valid, and on the death of an adopted son without issue, during the lifetime of the adoptive mother, the father's right of adoption vests in the widow and not in the mother. (b)

"A mother-in-law cannot legally compel her daughter-in-law under age to adopt against her will. If she has compelled an adoption by undue pressure the daughter-in-law can adopt again." (c) Undue influence indeed invalidates an adoption in every case. (d)

#### B. 3. 27.—ADOPTION BY WIDOW—CAPACITY AS AFFECTED BY INTELLIGENCE.

Where the husband has given an express direction the cases immediately preceding seem to show that his wishes may be carried out by a child widow. When a discretion has to be exercised general principles would require that a certain degree of understanding should have been attained before the duty is performed, but it does not seem that any precise rule on this point has been laid down in the case of adoption. Where a mental capacity is attained for religious functions in general it seems to be gained for adoption. Such restrictions as are recognized may be referred rather to other grounds than mere

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(a) MS. 1648. A widow under age it was said might adopt under a direction from her husband, though his brothers survived; *Haradhan Roy v. Biswanath Roy*, 2 Macn. H. L. 180.

(b) *Musst. Chimnee Bae v. Musst. Guttoo Bae*, 8 N. W. P. S. D. R. 1853, p. 636.

(c) MS. 1675.

(d) *Somasekhara Raja v. Subhadramaji*, I. L. R. 6 Bom. 524, 527.

defect of understanding unless this should amount to positive lunacy.

**B. 3. 28.—ADOPTION BY A WIDOW—HER CAPACITY AS AFFECTED BY HER STATE AS TO BODY, MIND, RELIGION AND CASTE.**

“Leprosy disqualifies a widow for adopting though otherwise competent.” (a)

A woman’s want of chasity deprives her acts of all religious efficacy. (b) An unchaste woman, pregnant in concubinage, is incompetent to adopt (c); but after removal of the sin by penance she can adopt. (d)

A widow under puberty cannot adopt, (e) except in some castes with the consent of her husband’s kinsmen, or of the caste, or of both. But even when the adoption is made by an immature girl the ceremonies should be deferred till after her “shanee” (f) or attainment of puberty.

“Widows of Brahmins and of others amongst whom the custom obtains are deemed impure after the attainment of puberty until they undergo tonsure. They cannot till then adopt.” (g)

“A widow who has attained puberty cannot perform any religious act and therefore cannot adopt until she has undergone tonsure.” (h)

(a) See B. 3. 17, p. 977, as to misconduct.

(b) See *Moniram Kolita v. Kerry Kolitany*, L. R. 7 I. A. at p. 125.

(c) *Sayamalal Dutt v. Saudamini Dasi*, 5 B. L. R. 362.

(d) *Thukoo Bae v. Ruma Bae*, 2 Borr. 488 (2nd Edn.).

(e) Steele, L. C. 48.

(f) *Ib.* 187.

(g) MS. 1672. A widow must have attained maturity and have undergone tonsure to give her the qualification. See above, B. 3. 26. The Śāstris have however in some instances allowed immature widows to adopt. See *ibid.*, above, p. 997.

(h) MS. 1615.

**B. 3. 29.—ADOPTION BY A WIDOW—CAPACITY ANNULLED BY HER REMARRIAGE.**

Re-marriage is not recognized amongst the higher castes. (a) Any association called by such a name is a cause of impurity disabling the subject of it from performing religious acts. But even amongst Śūdras re-marriage entirely severs the previous family connexion and prevents adoption by the widow who has formed a new alliance.

“A Śūdra’s widow having married another person cannot adopt a son to the deceased husband.” (b)

**B. 3. 31.—ADOPTION BY A WIDOW—CONSENT REQUIRED.**

The widow’s right to adopt under an express authority from her husband is unqualified by any absolute necessity for the consent of relatives. (c) In the absence of such authority she may, as a junior widow, require the consent of her co-widow, and as a member of her husband’s family the consent of his near relatives, provided it be not improperly withheld. (d)

**B. 3. 32.—CONSENT OF CO-WIDOW.**

Where there are two widows they ought regularly to concur in an adoption. In case of disagreement the right belongs, as we have seen, to the elder. (e) “But a second widow may adopt with the consent of the elder.” (f)

(a) See Act XV. of 1856, already several times referred to.

(b) MS. 1749.

(c) See above B. 3. 1 and B. 3. 2.

(d) See *Dinkar Sitaram Prabhu v. Ganesh Shivram Prabhu*, I. L. R. 6 Bom. 505.

(e) Sec. III. B. 3. 17.

(f) MS. 1658. The assent was in one case pronounced unnecessary. MS. 1663. See 2 Str. H. L. 94.

## B. 3. 33.—CONSENT OF MOTHER-IN-LAW.

The consent of a mother-in-law to an adoption by her adoptive son's widow seems to have been thought necessary, but was inferred from the absence of a prohibition in *Thukoo Bae Bhide v. Rumâ Bae Bhide*. (a) The necessity for this consent could not, probably, be maintained on the authorities.

## B. 3. 34.—ADOPTION BY A WIDOW—CONSENT REQUIRED OF HUSBAND'S KINSMEN OR SAPINDAS.

This subject has been much discussed in the judgments in recent years. The law varies in Bengal, Madras and Bombay. It differs according as the deceased husband was undivided or separated from his brethren. In the former case the dependence of the widow and the necessity for the sanction of the kinsmen is recognized by all the systems; in the latter case the Bengal law is still strict in requiring the husband's sanction, (b) the Madras law requires some sanction of the relatives, the Bombay law practically dispenses with it. (c)

"A woman cannot adopt without the consent of her husband. If the husband be dead he should have expressed his intentions which the widow may carry out. Failing this she must obtain his father's permission. Failing him she must obtain the assent of the relatives (or caste fellows). Without this the adoption is invalid. A deed transferring her property inherited from the husband to the adopted son is

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(a) 2 Borr. R. 488, 495. Perhaps the śâstris were influenced by the prevailing idea in Gujarâth of the mother's superiority to the wife. A similar opinion will be found below.

(b) *Raja Himun Chull Sing v. Koomer Gunsheam Sing*, 2 Kn. P. C. C. 203, 222. The case was one from Etawah in the N. W. Provinces.

(c) Jud. Cit. at p. 221. *Râmji v. Ghamdu*, I. L. R. 6 Bom. at p. 502.

invalid unless countersigned by the relatives." (a) "A widow must have her husband's permission ; or that of her father-in-law ; or of his widow her mother-in-law." (b) The Vyavahâra Mayûkha dispenses with the assent of the deceased husband of a widow on the ground that the text limiting a woman's power rests on her essential dependence during coverture, and expressly mentions only the assent of a husband to the act of the wife as necessary. (c) From the same text the Dattaka Mimâṃsâ deduces that the husband's express authority is indispensable. The middle doctrine of the assent of the kinsmen being necessary and sufficient is favoured by the Mayûkha, (d) and this may be considered to have prevailed over both the extremes, (e) at least in the case of a united family. A Hindû widow, who has not the family estate vested in her, and whose husband was not separated at the time of his death, is not competent to adopt a son to her husband without his authority or the consent of his undivided coparceners. (f)

As to what assent is sufficient, in default of authority from the husband, in case of adoptions in divided and undivided

(a) MS. 1652. The law here enunciated does not give the widow unbounded discretion. It rather resembles the law prevailing in Madras. See *Appaniengar v. Alemalu Annai*, M. S. D. A. R. for 1858, p. 5; Smṛ. Chand. Chap. I. paras. 31, 32 ; 2 Str. H. L. 92.

(b) MS. 1672. "Among the Brahmins &c..... the widow may adopt if ordered to do so by her husband before his death," even where on his decease his share is absorbed in the shares of his brothers. Steele, L. C. 176.

(c) Vyav. May. Chap. IV. Sec. V. paras. 16-18.

(d) *Loc. cit.* para. 17.

(e) See above, B. 3. 13.

(f) *Ramji v. Ghamâu*, I. L. R. 6 Bom. 498 ; *Dinkar Sitiram Prabhu et al v. Ganesh Shivram Prabhu*, I. L. R. 6 Bom. p. 505. Above, p. 997 note (a).



families, reference may be made to the cases below. In the first of these it was ruled that what constitute consent of kinsmen must depend on circumstances. In a united family a widow adopting without her husband's assent must have the permission of her father-in-law if he is alive; if he is dead the consent of all her husband's surviving brothers. (b) Where however the widow succeeds to her husband as owner of a separated estate the consent of her husband's nearest kinsmen is sufficient.

In the second case the High Court of Madras held that the assent of a single sapinda replaced what under the

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(a) *Collector of Madura v. Mutu Ramalinga Sathupatty*, 1 Bell R. 1 P. C.; S. C. 12 M. I. A. 397; S. C. 2 Mad. H. C. R. 206; *Varada Pratapa Sri Raghunadha v. Sri Brozo Kishoro Patta Deo*, W. R. 291 C. R.; 7 Mad. H. C. R. 301; L. R. 3 I. A. 154; 1 Mad. 69; *Sooburnomonee Debia v. Petumber Dobey*, 1 Marshall R. V. *Venkata Krishna Row v. Venkata Rama Lakshmi Narayana*, L. R. 4 I. A. 1; S. C. I. L. R. 1 Mad. 174. In this case it was held that limitation as against one disputing an adoption is to be computed from the time when he became aware of the adoption.

(b) "The authority of a father-in-law would probably be sufficient to a widow. It is not easy to lay down an inflexible rule for the cases in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be required is that there should be such evidence of the assent of kinsmen as is sufficient to show that the act is done by the widow in the proper *bonâ fide* performance of a religious duty and neither capricious nor from a corrupt motive." Privy Council in the *Ramnad* case (1 I. A. 442), on which Sir J. Colville observes (I. L. R. 1 Mad. 190).

"Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, and all which this Committee in the former case intended to lay down was, that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda. It is upon a fair consideration, by what may be called a family compact, of the expediency of substituting an heir by adoption to the deceased husband."

law would have been a procreation by him, (a) but from this the Judicial Committee dissent. The law of Madras, their Lordships say (b): "in this respect is something intermediate between the stricter law of Bengal and the wider law of Bombay," and by that law "a widow not having her husband's permission may adopt a son to him if duly authorized by his kindred." "The requisite authority," they thought, "is in the case of an undivided family to be sought within that family." (c) In the particular case the property was an impartible zamindary, and Holloway, J., having held that in such a case, though the family was undivided, the principles applicable to a divided family and a separated estate ought to govern succession and adoption, the Judicial Committee take occasion to intimate their doubt whether such a doctrine is tenable. (d) It is obviously inconsistent with the principle that "the substitution of a son of the deceased for spiritual reasons is the essence of the thing and the consequent devolution of property a mere accessory to it."

The wider law of Bombay referred to by the Judicial Committee is that allowing a widow of a Hindû separated from his family to adopt without the sanction of any one in any case in which the husband has not intimated a wish to the contrary. (e)

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(a) 7 Mad. H. C. R. at p. 305.

(b) L. R. 3 I. A. at p. 191.

(c) In earlier Madras cases it had been ruled that the relations whom a widow is to consult for adoption may be her father-in-law or other elders of the family (*Ramasashien v. Akyalandumal*, M. S. D. A. B. 1849, p. 115), or her husband's nephew (*Appaniengar v. Alemalu Ammal*, M. S. D. A. R. 1858, p. 5). The consent of his nephew as nearest male representative was held sufficient in *N. Chandrasekharuda v. N. B. Eahmana*, 4 Mad. H. C. R. 270.

(d) See L. R. 3 I. A. at pp. 191, 192.

(e) *Ramji v. Ghamau*, I. L. R. 6 Bom. at p. 503. See above, pp. 864, 881.

In *Raja V. V. Krishnarao's* case, (a) reference is made to the *Râmnâd* case (b) to show that where the deceased had been separate in estate such "assent of kinsmen suffices [as will] show that the act is done by the widow in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive." As to this "their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow." Where, as in Bombay, the widow's authority in a divided family is greater, it would obviously be still more dangerous to scrutinize her motives too closely in the light cast on them by the suggestions of interested relatives. The difficulty is removed by dispensing with their sanction. The opinions of the Sâstris on this subject have varied somewhat according to the authorities on which they have relied, but the doctrine of the *Samskâra Kaustubha* has generally prevailed. (c)

The assent of separated kinsmen will by no means replace that of the deceased husband's undivided brother. (d) Where the husband of a Hindû widow dies separated, and she herself is the heir, or she and a junior co-widow are the heirs, she may adopt without the sanction of her husband (if he have not, expressly or by implication, indicated his desire that she shall not do so) and without the sanction of his kindred. (e)

In one Bombay case it was held that the consent of a single sapinda in a family apparently undivided was suffi-

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(a) L. R. 4 I. A. 1; S. C. I. L. R. 1 Mad. 174.

(b) 12 M. I. A. 397.

(c) See above, pp. 864, 881.

(d) *Sri V. P. Baghunadha v. Sri Brozo Kishore*, L. R. 3 I. A. at p. 189.

(e) *Rakhmabai v. Radhabai*, 5 Bom. H. C. R. 181 A. C. J.; *Ramji v. Ghamâu*, 1. L. R. 6 Bom. p. 498.

cient to validate an adoption by a widow, (a) but this cannot now be considered as the received law. (b) Where assent is needed it is the assent of the father or of all the male members of the undivided family. Still, however, the right to give or refuse assent cannot be regarded as absolute. "The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption." (c) A widow refused permission without reasonable grounds might on Hindû principles properly apply to a Civil Court for a declaration of her right to adopt even against the will of one or more of the sapinḍas of the husband. (d)

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B. 3. 35.—ADOPTION BY A WIDOW—WITH CONSENT  
OF THE CASTE.

A woman may adopt for her deceased husband if she has permission of the caste(e) according to some interpretations.

In *Sree Brijbhokunjī's* case (f) the Sâstris are made to say that a widow not having a written permission from her

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(a) *Gopaṭ Shridhar v. Naro Vinayak*, 7 Bom. H. C. R. App. xxiv., approved in *Rukhmabai's* case, 5 Bom. H. C. R. at p. 190.

(b) See *Ramji v. Ghamāu*, I. L. R. 6 Bom. at p. 503.

(c) *The Collector of Madura v. Mootoo Ramalinga Sathupathy*, 12 M. I. A. at p. 442. This agrees with the *Nirṇaya Sindhu* and the *Vyav. Mayūkha*.

(d) See above, Sub-sec. B. 3. 26, p. 997, note (a).

(e) *Narayan v. Nana*, 7 Bom. H. C. R. 153 A. C. J.; *Vyav. May. Chap. IV. Sec. V. 17, 18*; *Steele, L. C. 48, 188*; *Sree Brijbhokunjee Maharaj v. Sree Gakoolootsaojee Maharaj*, 1 Borr. 181, 202 (2nd Edn.); *Thukoo Bae v. Ruma Bae*, 2 Borr. 488 (2nd Edn.) See above, p. 971.

(f) 1 Borr. R. at p. 214.

husband may adopt with the sanction of the caste and the cognizance of the Government. The jñāti are more properly the kinsmen, the gentile relatives, and so Colebrooke translates the word, (a) but the Śāstris insist on the approval of the caste unless indeed members of it be not within reach for consultation. (b) They therefore must have taken jñāti in the sense of caste fellows.

Many castes at Poona said a widow could adopt with the consent of the caste. (c) They probably took the ambiguous "jñāti" in a sense supporting this rule.

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**B. 3. 36.—ADOPTION BY A WIDOW—CONSENT OF PERSONS WHOSE INTERESTS ARE AFFECTED BY THE ADOPTION.**

It has been shown above, B. 3. 25, that according to some decisions a vested interest cannot generally be divested by means of an adoption. According to the same decisions however the person whose estate is to be divested may assent to the adoption and thus give it validity. This doctrine agrees with that of the Hindū lawyers in so far as it gives weight to an assent which must be disinterested. It is opposed to the Hindū law if it is applied so as to make the widow's right to adopt absolutely dependent on the assent of one who is interested in refusing it. A separated relative on whom the widow is not spiritually dependent does not acquire a right to control her by taking the estate for which it is her religious duty to provide a better heir. The mother of the deceased is hardly less bound than his widow to secure his eternal peace; she can have no right to deprive him of it, merely because she may have succeeded to the estate. The doctrine as thus far developed takes no account of the joint right even in the case of collateral

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(a) See Mit. Chap. I. Sec. XI. para. 9, note.

(b) *Brījhookunjee's case*, 1 Borr. 216.

(c) Steele, L. C. 187.

succession according to some jurists (a) which the son of the man in whom the estate has vested has forthwith acquired in that estate. The sons' assent to an adoption, if the need for assent rests on proprietary right, ought to be as essential as their father's, but the law has not been pushed to this logical conclusion. Nor has the vested interest as yet been held to involve a right to defeat an express authority to adopt given by the deceased owner to his widow. Such an effect indeed would be entirely opposed to the decisions. (b) But as the widow's capacity rests on a presumed assent there seems to be no good reason where this principle is admitted for allowing an interested relative merely on the ground of his interest to annul the presumed authority. The necessity for sanction is really a consequence of the widow's dependence. (c) According to the Bombay law she cannot adopt to take away an estate from collaterals without their assent except when she herself has a right superior to theirs. In an undivided family she has to obtain their sanction ; in a divided family she herself represents the line failing other representatives, that would be represented by her adopted son. (d) When she ends one collateral line she cannot take away the estate from another by adoption. (e)

It is desirable that the actual decisions should, if possible, be brought into harmony with the principles thus deduced

(a) See above, pp. 710-712.

(b) See above, B. 3. 13, B. 3. 23, B. 3. 25; above, p. 1001.

(c) Above, B. 3. 23; pp. 230 ss, and 1005.

It is inconsistent with the consent of relatives, being in them a right of property that, if they refuse it, it may generally be replaced by that of representative members of the caste. Steele, S. C. 394. A question which the caste cannot settle may be referred to the ordinary Courts. *Ib.* 185, 186.

(d) See *Lulloobhoy v. Cassibat*, L. R. 7 I. A. 212.

(e) See above, Sub-secs. B. 3. 23, B. 3. 25, B. 3. 34.

from the Hindû law itself. These decisions are in themselves somewhat contradictory, and as the Courts in India have built on a few dicta of the Judicial Committee a theory which they seem too narrow to support, a return to the guidance of native authority may be the course attended with least disturbance of precedents.

In the Marâthâ country, it was maintained, by Sir R. Couch on a very complete review of the authorities that a conscientious adoption by a widow without the consent of kinsmen or co-widow may be legal. (a) In a later case, (b) this was qualified by a statement that the consent of a kinsman would be material if an interest in property is vested in him, and he would be divested of it by the adoption. (c) This prohibitive power was even placed in the hands of a kinsman's widow. Thus a widow of the husband's brother who died in possession, (d) or a widow of a son who died after his father, (e) are not, it is said, to be divested by an adoption which would give to the adopted son a place prior to them in the line of inheritance. The deceased husband was the last full owner in these cases. Where the deceased was a member of a joint family the

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(a) *Rakhmabai v. Radhabai*, 5 Bom. H. C. R. 181 A. C. J.

(b) *Rûpchand Hindumal v. Rakhmabai*, 8 Bom. H. C. R. 114. In this case one of two co-widows it is said must submit to an adoption by another for her husband's beatitude, while to the widow of a united brother such an adoption would work "manifest injustice." But as the adoption could be made to the prejudice of the surviving brother, why not to the prejudice of his widow, who at most continues his existence? The widow of the first deceased similarly continues his existence, and the Hindû law contemplates an adoption by the widow of each brother so as to reproduce the united family.

(c) *Annamali v. Mahbu Bali Reddy*, 8 Mad. H. C. R. 108; *Kally Prosono Ghose v. Gocool Chunder*, I. L. R. 2 Cal. 295.

(d) *Rupchand v. Rakhmabai*, 8 Bom. H. C. R. 114 A. C. J.

(e) *Musst. Bhobun Moyee Debia v. Ramkishore Acharjee*, 10 M. I. A. 279; S. C. 3 C. W. R. 15 P. C.; Beng. S. D. A. R. 1858, p. 122.

widow of a predeceased coparcener may, on the principles above stated, adopt after the death of the last deceased as she could before it, and with a similar effect. (a) Where he was separated no right can be acquired against his own line by adoption in another. Where on failure of his own line and of united coparceners the estate has passed to a separated branch it cannot be taken away by another by means of a subsequent adoption; but the failure of his own line is not definitive until his widow has died without adopting.

### B. 3. 37.—ADOPTION BY A WIDOW—CONSENT OF GOVERNMENT.

It has been shown (A. 4. 4) that the consent or at least the acquiescence of the Government has sometimes been thought requisite to a valid adoption. The same idea has prevailed still more with respect to adoption by widows. It does not seem to be better founded in the one case than in the other. Some intimation to the Government might be desirable for publicity, and where an estate supporting a public office was to be taken there were obvious reasons why the sovereign should insist on adoptions being made only with his approval, but so far as the Hindû law is concerned such a sanction was not needed any more for the adoption than for the procreation of a son. (b) Each is in its place a religious duty, superior to the will of the temporal ruler. Yet according to the Śâstri—

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(a) A partition and distribution after a coparcener's death seem to prevent a recovery by a son afterwards adopted by his widow. See below, Sec. VII.

(b) "In contemplation of law such (adopted) child is begotten by the father . . . . . on behalf of whom he is adopted." Per Willes, J., in the *Tagore* case, L. R. Suppt. I. A., at p. 67.



"The assent of relatives and of the Government is requisite to the validity of an adoption by a widow." (a)

"The sanction of Government is necessary to an adoption by a widow." (b)

Except when her husband is alive a woman may adopt (c) with the sanction of the ruling power. (d)

(a) MS. 1644. The assent of the Government is not now deemed necessary, *Rangoobai v. Bhagirthibai*, I. L. R. 2 Bom. 377; *Narhar Govind Kulkarni v. Narayan Vithal*, I. L. R. 1 Bom. 607; 2 Str. H. L. 88.

(b) MS. 1644. But as to this see A. 4. 4. In the *Mankars'* case the following replies were given by the Śāstris:—

1. "That a woman, whether Brāhman or Shoodr, was permitted to adopt a son, without her husband's order, after his death."

2. "That the widow could adopt a son after her husband's death."

3. "A woman is permitted to take a son in adoption according to the Mayookha."

4. "From political motives Bajee Rao declared the adoption of a son by a widow, without the orders of her husband, to be illegal, though he permitted two or three exceptions."

5. "The widow is permitted by the Shastr to adopt any one as her son."

6. "An elderly widow is allowed, of her own accord, to do that which will insure her happiness in the next world, and as adopting a son is one means of attaining it, she may adopt a son."

(c) *Narayan v. Nana*, 7 Bom. H. C. R. 153 A. C. J.; Steele, L. C. 45, 47, 187.

(d) *Sree Brijbhokunjee Maharaj v. Gokolootsaojee Maharaj*, 1 Borr. 181, 202 (2nd Edn.).

In this case the Śāstri said:—"A widow, notwithstanding she has no written permission from her husband, may, if she be desirous of adopting a son, do so legally by obtaining the sanction of the gentiles, and informing the ruling authorities."

"A woman . . . in the event of her receiving no order (from her deceased husband) must send for her relations . . . and

When the Government has sanctioned and confirmed an adoption, gift, or bequest, the defectiveness thereof need not be inquired into. (a) Its non-interference entitles the adopted son to succeed to a vatan. (b)

**B. 3. 38.—ADOPTION BY A WIDOW—OMISSION OR POSTPONEMENT OF ADOPTION.**

Though it is a religious duty on the widow's part to give effect to any express direction left by her husband she cannot be constrained to perform it. Without good will indeed the reception could hardly be religiously perfect. The cases collected under B. 3. 15 will serve to illustrate this subdivision also along with those which follow.

The right of inheritance is not suspended by pregnancy or until adoption. (c)

Authority to adopt, upon death of the natural son, does not prevent the widow from succeeding to the son, the authority not being imperative. (d)

A widow having permission to adopt three sons in succession cannot be compelled to act on that permission before she is

after acquainting the ruling authorities, may adopt a son according to the ceremonies laid down in the Vedas."

(a) *Sree Brijbhookunjee Maharaj v. Sree Gokoolootsaojee Maharaj*, 1 Borr. 181, 202 (2 Edn.); *Rakhmabai v. Radhabai*, 5 Bom. H. C. R. at p. 187 A. C. J. The importance attached to confirmation by the sovereign where a public trust was concerned may be seen from pp. 206, 209 of the report of Borradaile.

(b) *Ramachandra Vasudev v. Nanajee Timajee*, 7 Bom. H. C. R. 26 A. C. J., in which references were made to *Bhasker Buchajee v. Narro Raghunath*, Select Cases p. 25; *Virbudru Hurrybudru v. Bae Rane*, Morris, Pt. II. p. 1; *Trimbak Baji Joshi v. Narayan Vinayak Joshi*, 3 Morris's S. D. A. R. p. 19; *Vishram Baboorow v. Narainrow Kasse*, 4 *ibid.* 26; *Chenbasawa v. Pampangowda*, S. A. No. 655 of 1864; *Rakhmabai v. Radhabai*, 5 Bom. H. C. R. A. C. J. 181.

(c) *Dukhina Dossee v. Rash Beharee Mojomdar*, 6 C. W. R. 221.

(d) *Dino Moyee Chowdhra*, v. A. D. C. Rehling, 2 C. W. R. 25 Mis. Rulings.

allowed to take her contingent estate on the death of the adopted son. (a) A husband's express authorization, or even direction, to adopt, does not constitute a legal duty on the part of the widow to do so, and for all legal purposes it is absolutely non-existent till it is acted upon. (b)

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### B. 3. 39.—ADOPTION BY A WIDOW—PRETENDED ADOPTION.

Some instances of pretended adoption have occurred and have been dealt with by the Courts on the ordinary principle of avoiding fraudulent transactions. As a pretended adoption is not an adoption, the subject does not require detailed treatment.

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### B. 4.—ADOPTION BY FEMALES—ANOMALOUS ADOPTIONS.

As the husband and wife must be joint parents of the legitimate begotten son, and ought to join in adopting a boy to replace him, so the widow alone can in strictness be qualified to adopt after her husband's death a son who, becoming his son, becomes hers also. And so long as the widow exists it is quite opposed to principle that she should be supplanted in the performance of this duty by any one else. But in the case of boys dying as infants the right of the mother to adopt has gained recognition by a kind of necessity, and this right has in some instances been allowed an extension even to cases in which the deceased son had left a widow. Where a son has died before his father the sacra have never wholly devolved upon him, and adoption by the father may be conceived as not depriving the daughter-in-law of any distinct spiritual jointure; where she is ousted

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(a) *Deena Moyee Dossee v. Doorgapershad Mitter*, 3 C. W. R. 6 Mis. App. See above, pp. 903, 904.

(b) *Uma Sunduri Dabce v. Sourobince Dabce*, I. L. R. 7 Cal. p. 238.

by her mother-in-law, it must rather be ascribed to confusion of thought or to the predominance allowed in many ways to a mother by caste custom, some instances of which have already been noticed. (a)

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**B. 4. 1.—ANOMALOUS ADOPTIONS—ADOPTION  
BY MOTHER.**

A widow, after succeeding to her natural born son as his heiress, may adopt a boy to her own husband, (b) or, it is said, to the son himself, (c) so as to divest her own interest.

“If a daughter-in-law has made an invalid adoption contrary to the wish of the mother-in-law the latter may adopt an eligible person.” (d) “If she make an illegal adoption her mother-in-law may make one.” (e)

A widow having, against the wish of her mother-in-law, who wanted a boy of her own gotra, adopted one of a different gotra, this was pronounced invalid. The mother-in-law adopted a boy of her gotra. The Śāstri pronounced this, too, illegal, as the right vested in the daughter-in-law. But of the two the preference was, he said, to be given to the adopted of the mother-in-law as being of the same gotra. (f)

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(a) See above, pp. 99, 100, 157, 392.

(b) *Bykant Mony Roy v. Kristo Soondery Roy*, 7 C. W. R. 392.

(c) *R. V. Venkata Krishna Rao v. Venkata Rama Lakshmi Narsayya*, L. R. 4 I. A. 1; S. C. I. L. R. 1 Mad. 174.

“A widow succeeding as heir to her own son does not lose the right to exercise the power of adoption. By making an adoption she divests her own estate only.” The adoption by a mother on account of her deceased son is questionable. It is impossible that the same boy should have been her son and her son’s son. Her adoption should be of a son to her husband, in place of the one deceased without son or widow. See B. 3. 13; 2 Str. H. L. 94.

(d) MS. 1672. But see 2 Str. H. L. 91 ss.

(e) MS. 1632.

(f) MS. 1744. See above, p. 100 Note (a).

In a case at 2 Str. H. L. 93 the Śāstri said a mother directed to do so by her dying son could adopt for him. Mr. Ellis treated this as a case of delegation, and thought she might act as her son's deputy, as "the Hindû law and religion allows of vicarious substitution in almost every possible case." The mother could not act as "deputy" for a son deceased, but during his life he might perhaps commission her to act for him, in a simply ceremonial act, (a) though this is not certain. Colebrooke in the case in question seems to have thought that a mother might complete, on behalf of her son, an adoption begun by the latter but interrupted by his death. Sutherland thought that notwithstanding the son's request the mother could not, after his death, adopt for him. (b) Adoption by a mother to her own husband after her son's death is, as we have seen, under some circumstances permissible. An adoption by her to her son cannot be regarded as otherwise than grossly anomalous. It is only his wife or his widow who can adopt for a man (c) and at the same time for herself, the adoption taking the place of procreation, in which a son and a mother could not possibly join. (d)

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#### B. 4. 2.—ANOMALOUS ADOPTIONS BY FEMALES— BY A DAUGHTER-IN-LAW.

The case discussed above under A. 2. 3 may, from one point of view, be regarded as falling under this section.

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(a) See *Vijiarangam v. Lukshman*, 8 Bom. H. C. R. at p. 256 O. C. J.

(b) So per Westropp, C. J., in *Bhagvandas Tejmal v. Rajmal*, 10 Bom. H. C. R. at p. 265.

(c) *Bhagvandas v. Rajmal*, 10 Bom. H. C. R. 241.

(d) An adoption invalid on account of an intervening holder of an estate is not set up by the death of that person. See *Bykant Moones Roy v. Kisto Soonder Roy*, 7 C. W. R. 392, as compared with the explanation of *Bhoobun Moyee's* case, in *Pudma Coomari v. Court of Wards*, L. R. 8 I. A. 229.

The validity of such an adoption would hardly now be admitted. (a)

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### C. 1.—QUASI ADOPTIONS—BY MALES.

"Of the twelve enumerated sons two only—the lawfully begotten and the adopted—are allowed in the Kaliyuga. (b)

The Kritrima adoption by a male to himself alone or by a husband and wife to both conjointly, is still recognized in Maithila, (c) but it is of little or no importance for other districts.

The pālak putra has no right as such. (d)

"A foster-son may be heir by custom." (e) In such a case the "adoption" must, so far as is known, be made by the foster father himself.

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### C. 2.—QUASI ADOPTIONS BY FEMALES—KRITRIMA ADOPTIONS.

"In Maithila the widow is as of right at liberty to adopt without special authority for the purpose (a Kritrima son); the adopted in this case succeeding to her exclusive property only, not to that of her deceased husband to whom he is not considered in any way related." (f) He acquires no relationship save to the adopting mother. (g)

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(a) In *Dinkar Sitaram v. Ganesh Shivram Prabhu*, I. L. R. 6 Bom. 505, the authorization of a father-in-law seems to have been thought of some importance. But no part of the ultimate decision rests on this point. At p. 508 line 5, a seeming error is caused by the omission of the word "of" before "Krishna."

(b) MS. 1633.

(c) See below, Sec. VII.

(d) Steele, L. C. 184. As to the pālak putra see above, p. 925.

(e) MS. 1707. As to the fosterage or quasi adoption prevalent amongst the lower castes see above, p. 924.

(f) 2 Str. H. L. 204, quoting Sutherland's Synopsis.

(g) *Boolee Singh v. Musst. Busunt Koverce*, 8 C. W. R. 155. With the Kritrima adoption may be compared that allowed in the later ages of the Roman law. See above, pp. 905, 936.

In Maithila it appears that a wife may adopt to herself independently of her husband by the Kritrima form. The son thus taken succeeds only to her Strīdhana. (a)

The son thus adopted by a wife or a widow does not lose his place in his own family. (b)

The consent of the person adopted is indispensable. (c)

#### C. 2. 1. QUASI ADOPTIONS BY FEMALES—SUBJECT TO THE ALYA SANTĀNA LAW.

A female, where the Alya Santāna law prevails, cannot adopt, if she have male issue living. (d)

#### C. 2. 2.—QUASI ADOPTIONS BY FEMALES —BY KALWANTINS, NĀIKINS, &c.

“The Śāstras contain no rules applicable to adoption by Kalwantins.” (e) A dancing girl, it was said, can adopt, but only a daughter. (f)

The Paṇḍit of the Supreme Court at Calcutta when consulted on an adoption of a daughter by a courtesan answered that there was no such instance of the adoption of a daughter to inherit by the Hindū law. (g)

(a) *Sree Narain Rai v. Bha Jha*, 2 C. S. D. A. R. 23.

(b) *Collector of Tirhoot v. Hurroo Persad Mohunt*, 7 C. W. R. 500 C. R.

(c) *Luchman Lal v. Mohun Lal*, 16 C. W. R. 179 C. R. See above, pp. 905, 925, 931.

(d) *Cotay Hegady v. Manjoo Kumpty et al*, M. S. D. A. R. 1859, p. 138. The Alya Santāna succession is that of a nephew to his maternal uncle. See above, pp. 287, 289, 421.

(e) MS. 1651.

(f) *M. C. Alasani v. C. Ratnachellum*, 2 Mad. H. C. R. 56. This is not a real adoption. See above, p. 933. The adoption (so called) of a Pālak Kanya as a dancing girl may be annulled at pleasure by the adopter, Steele, L. C. 185.

(g) *Doe dem Hencower Bye v. Hancower Bye*, 2 Morl. Dig. 133.

## SECTION IV.

### FITNESS FOR ADOPTION.

When a substitutionary son is needed the man seeking him is not at liberty to adopt any child indiscriminately. There are conditions as to sex, (a) caste, family and personal qualities, which must be satisfied in order to constitute a fit subject for adoption. Some of these afford no more than a ground of preference, but others are indispensable. They go to the root of the capacity to render the desired benefits, or rest on the duties due to the family of birth, which must not be thrown off even in the lower castes. The statement that "an adoption once made cannot be set aside" (b) cannot be sustained in the sense that a mere performance of the ceremonies gives validity to an adoption of a disqualified person, (c) or one given by a person not competent to make the gift. Sir M. Westropp denied that the *factum valet* principle could be applied to such a case (d) where a widow without express authority had given an only son in adoption.

#### 1.—FITNESS FOR ADOPTION AS AFFECTED BY CASTE.

The rule which requires that a boy who is to be adopted shall be of equal class with the adoptive father, has already been considered. (e) It is implied in several of the texts

(a) The ancient institution of the putrika-putra makes the mention of "sex" not superfluous. See Vyav. May. Chap. IV. Sec. V. para. 6.

"The substituting of a daughter for a son is also prohibited, being included amongst those rejected in the Kaliyuga." 2 Str. H. L. 152.

(b) *Raje Vyankatrao v. Jayavantrao*, 4 Bom. H. C. R. at p. 195.

(c) *Lakshmappa v. Ramava*, 12 Bom. H. C. R. at p. 389, and the cases there quoted.

(d) *Ib.* p. 397. So Colebrooke at 2 Str. H. L. 178.

(e) Above, p. 928. See Vyav. May. Chap. IV. Sec. V. para. 4.



quoted below. The instances of a breach or attempted breach of this rule are, as might be expected, very few. In two cases the following answers were given :—

“ No adoption is permitted from a different caste.” (a)

An adoption was pronounced illegal on the grounds that the adopted was of a different caste from the adopting widow, and was an only son. (b)

## 2. 1.—CONNEXION IN FAMILY GENERALLY.

By the birth of a son to one of several brothers, says the Smṛiti, (c) all become fathers of male offspring. The probable origin of this notion has already been discussed. (d) In the more recent developments of the law we have seen that a brother might properly be called in to supply a brother's failure to procure offspring. (e) In this state of the scripture and of custom it was natural that as adoption gradually supplanted the other methods of recruiting a family the brother's son should seem the fittest for adoption. In his case there was a kind of sonship already, so much so that some writers contended against the necessity of any adoption at all when there was a brother's son. (f) There could be no question in his case as to an effective change of gotra seeing that no change was needed. He would of necessity

(a) MS. 1637. An adoption is annulled if it be discovered that the boy adopted was of a lower caste than the adoptive father, Steele, L. C. 185. This means that the adoption is declared to have been null from the first. See Datt. Mīm. II. 25, 27.

(b) MS. 1750. It may seem strange that such a question should have arisen, but the Vīramitrodaya, Tr. p. 117, admits a Śūdra son by adoption to one of higher caste. See above, p. 928.

(c) Manu IX. 182; Mit. Chap. I. Sec. XI. para. 36; Vyav. May. Chap. IV. Sec. V. para. 19.

(d) Above, p. 419.

(e) Above, pp. 879, 880.

(f) See Datt. Mīm. Sec. II. 73.

sacrifice to the same remote ancestors with the same formulas as would a begotten son of the adoptive father. Besides these considerations the preference of a brother's son found a natural basis in family affection, (a) and when the brethren were united, as in early times they usually were, the interest of all, and of the children of those who had sons, were better preserved by adopting a son from amongst the necessary participators of the estate than by introducing a stranger who would take a part from all the other members of the family. (b) Amongst remoter relatives these reasons could not operate with the same force. But it was inevitable that next to a brother's son, a cousin, or a cousin's son should be sought as the fittest for adoption, and that the order in point of proximity should become that of practical preference in selection. (c) A man, Vasishṭha says, is to adopt the son of the nearest relative who can and will give one; (d) but of two persons equally nearly related, either is eligible. (e) Genealogies carefully preserved indicated

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(a) The Datt. Mim. Sec. II, 29, says a half-brother's son is not to be taken while a whole brother's son is available. There is almost a repulsion between sons of rival wives. But *see* below, p. 1024.

(b) The nearness which is generally understood as nearness of family connexion is by some construed as nearness in locality of residence. *See* Vīram. Tr. p. 117. This view seems to be favoured by the Mit., *see* Chap. I. Sec. XI. paras, 13, 14, and Notes. The Vyav. Mayūkhā says the nearest by blood is to be taken, *see* Chap. IV. Sec. V. para. 19, and Datt. Mim. II. 16; V. 36, 38.

(c) *See* above, p. 913, as to the superior claims of the nearer relatives.

(d) Vasishṭha, Chap. XV. 6.

(e) *Sree Brijbhookunjee Maharaj v. Sree Gokoolootsaojee Maharaj*. 1 Borr. 181, 202 (2nd Edn.).

The Pandits said, "it is written in the Mayūkh that it is necessary that the person to be adopted be of a virtuous disposition, learned, beloved by him who adopts him, and also be the nearest of kin to him, adding verbally, that if there were two persons equally near, Mahārānee would be at liberty to adopt either." *See* Datt. Chand. I. 10; Vyav. May. Chap. IV. Sec. IV. para 19.

at once whence wives might not, and sons, if need were, might be had; the gotra invocations were the same; and the higher deities were worshipped under the same names and conceptions. It is not surprising that the limitation of choice which was thus induced in practice should have come to be regarded by many as necessitated by the law; (a) but the sources do not afford any authority for such a restriction. What they exact is nearness and likeness, so far as these can be secured, identity of caste, according to the best interpretations, and also, but not indispensably, of family or gotra. Amongst the Śâdras the distinctions of gotra in the Brâhminical sense cannot exist. (b) Their quasi-gotras mark the more distant family connexions, but there is no objection to a Śâdra adopting from a gotra different from his own. (c)

The question being as to the existence of a legal objection to the adoption of a son from a remote branch the Śâstri answered only: "The Śâstra is in favour of the adoption of a boy belonging to the near branch." (d) Colebrooke says that only a preference is to be given to a brother's son, not so exclusive a preference as to shut out the exercise of discretion. (e) The prohibition against an adoption of an asagotra is of a moral rather than legal character, (f) and in one case a Śâstri expressed the opinion that "if a Brâhman cannot find a person fit for adoption in his own gotra he may adopt from another gotra a man of 30 having children." (g)

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(a) See Mit. Chap. I. Sec. XI. paras. 13, 36, Note; Vyav. May. Chap. IV. Sec. V. para. 19; Datt. Mîm. Sec. II. paras. 2, 13.

(b) See Datt. Mîm. II. 5 ss. 80.

(c) *Rangamma v. Atchamma*, 4 M. I. A. 1.

(d) MS. 1640. See Datt. Mîm. II. 18.

(e) 2 Str. H. L. 103.

(f) *Durma Samoodhany Unmal v. Comara Venkatachella Redayar*, M. S. A. R. 1852, p. 111; 1 Str. H. L. 85; 2 *ib.* 98, 103, 106.

(g) MS. 1639.

In another case amongst Brāhmans, a question having been put as to the adoption by a widow of a boy whose upanayana (a) had been performed, the answer was merely that if a boy of her own gotra could not be obtained she might take one of another gotra. (b)

The general rule of propinquity giving a preference for adoption is illustrated by the following cases. A few of them admit the adoption of a younger by an elder brother. Bālcandra Śāstri gathered a support for this adoption by inference from the elder brother's being "in place of a father," (c) but the Smṛiti had in view merely the nurture and protection of the family by its head. The castes do not seem to have admitted this adoption, and it is opposed to the principle of imitating nature. (d) It can hardly be regarded, therefore, as allowed by the law.

In *Brijbhukhan's* case (e) the Śāstris say that the person to be adopted must be the nearest of kin who can be obtained. But then they add that what has been done conformably to the Vedas cannot be undone, and that a son taken, not from amongst the gentiles, even by a widow, is not a mere dharm-putra but a datta-putra with the full rights of that relation. (f) It follows that the preference of the nearest is not a matter of legal obligation.

A widow, on the death of her son, adopted a remoter kinsman than one who was available, and on his behalf applied for a certificate of guardianship, which was refused, as the adoption was prejudicial to rights of nearer heirs, and their consent was not shown to have been obtained to rebut the

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(a) Thread ceremony.

(b) MS. 1617.

(c) Steele, L. C. 44.

(d) See Datt. Mīm. Sec. III. 30.

(e) 1 Borr. R. at p. 214.

(f) 1 Borr. 218.

presumption of caprice arising from the facts. She was referred to a regular suit to establish a valid adoption, and directed to renew the application for guardianship under Act XX. of 1864. (a)

In the following case the Śāstri in approving the adoption to a man of his brother by birth put the permission on the ground of a total severance of natural ties by the adoption of the deceased into another family. (b) "Adoption," he said, "severs the connection with the natural relatives so completely that the adopted son's widow may adopt his younger brother. (c) But consanguinity, according to the general opinion, is not to be over-looked in adoption any more than in marriage.

Though the adopting brother has been adopted into another family, several decisions have settled that he cannot adopt his natural brother, on the ground that consanguinity does not cease with adoption. (d) Thus it has been ruled that a brother cannot adopt his brother in Maithila, (e) or in the Andra country, Madras. (f)

A Maratha, a widow, having adopted her husband's illegitimate son, his right to inherit was put on his position as a bastard son of a Śūdra. (g)

(a) *Bhagubai v. Kalo Venkaji*, Bom. H. C. P. J. 1875, p. 45.

(b) Above, p. 934.

(c) MS. 1625.

(d) *Moottia Mudalli v. Uppon Venkatacharry*, M. S. D. A. Dec. 1858, p. 117. See below, Sec. VII.

(e) *B. Runjeet Singh v. Obhye Narain Singh*, 2 C. S. D. A. R. 245.

(f) *Ramanamall v. Suban Annavi*, 2 Mad. H. C. R. 399; *Muttusawmy Naidu v. Lutckmeedevumma*, M. S. D. A. Dec. 1852, p. 96; *Moottia Mudalli v. Uppon Venkatacharry*, M. S. D. A. Dec. 1858, p. 117. Not even his half-brother, see below, Sub-Sec. 2. 4.

(g) MS. 1691.

## 2. 2.—RELATION BETWEEN THE BOY TO BE ADOPTED AND THE ADOPTIVE FATHER THROUGH THE NATURAL FATHER.

This connexion affords, as we have seen, the strongest ground of preference, but it does not, according to the decisions, give to the nearer relatives a legal right to impose a son on a person about to adopt. This would indeed be inconsistent with the affectionate relations which it is an object of the law to foster between those connected by adoption. (a) The limitation of choice has been thought somewhat stricter in the case of a widow, and there are some obvious reasons why this should be so, but in a united family her necessary dependence secures the desired end, and it cannot be said that apart from this she is confined to the family or gotra of her husband by any strictly legal restraint. (b)

A near relative of the same gotra, a nephew if possible, (c) is the first choice. Failing such, a distant gotraja. Failing him, a bhinna gotra-sapinda. (d) Failing him a non-sapinda of not more than five years, and whose tonsure (chaula, chûdâ) has not been performed. If such an one cannot be obtained then one of greater age may be taken. (e) Steele gives the order of choice in adoption according to the customary law of the Dekhan as follows (f):—Any brother's son should be the first selected for adoption; should there be none, or should the boy's parents, &c., refuse consent, his place is to be supplied by—(2nd), Any boy of the same

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(a) See the texts quoted below.

(b) *Srimati Uma Deyi v. Gokoolanand Das Mahpatra*, L. R. 5 I. A. 40.

(c) Datt. Mīm. II. 67, 73.

(d) As to these terms see above, pp. 114, 133.

(e) MS. 1672. In the Punjab amongst many tribes there is no limit, but the adoption must preferably be from amongst near kinsmen and must be from the gotra or tribe. Punjab Customary Law II. 155.

(f) Steele, L. C. 44.

gotra, and descended from a common ancestor within three generations (sanghit, sagotra, sapinda); (3rd) Any boy connected with the family by the female line of connexions, for whom funeral cakes are offered (usagotra sapinda), such are the mother's brother's son, or the father's sister's son; (4th) Any boy of the same gotra, descended from a common ancestor within seven generations, within which degree marriage is prohibited (wirudh sumbandh)—these relations are called the sagotra dushantil; (5th) Any boy of the same gotra, the genealogy of whose relationship is otherwise unknown (sagotramâtra); (6th) A boy of a different gotra, but of the same caste (pargotra)—such are the sister's son and daughter's son, who are adoptible in default of the preceding. A paternal uncle cannot be adopted, being in place of his father. Nor a maternal uncle, for "an elder relation" (without regard to the relative age of the parties) "cannot be adopted."

The castes at Poona answered more simply :—(a)

The following relations are to be selected in order :—1, brother's son; 2, paternal first cousin; 3 paternal second cousin; 4, one of the same gotra; 5, one of the same caste, P. Should the party first in order be refused by his immediate family, the caste may advise, and if they fail to persuade the party, another boy is, with their concurrence, to be adopted.

From Khandesh a still simpler answer was received :—(b) "The son of the nearest relation is to be adopted; but should his father not consent, a stranger may be adopted with the consent of several respectable persons."

"The son of a half brother may be adopted in preference to the son of a full brother." (c)

(a) Steele, L. C. 182.

(b) Steele, L. C. 182.

(c) MS. 1627. This is opposed to the Datt. Mim. Sec. II. 29.

The existence of a brother's son does not deprive the uncle of power to adopt another boy, the selection being a matter of conscience and not of absolute prescription. (a)

"A man may adopt the son of a distant, instead of the son of a near, kinsman." (b)

"The widow. . . . is enjoined to give preference to the nearest relation who is eligible. But the validity of an adoption actually made does not rest on the rigid observance of that rule of selection: the choice of him to be adopted being a matter of discretion." (c) The Śāstris have expressed the rule more strictly. A husband's brother's son, they said, can be adopted by a widow, even without the injunction of the husband. (d) When such nephew exists, she cannot adopt another without her husband's injunction. (e)

(a) *Gokoolanund Doss v. Musst. Wooma Dase*, 15 Beng. L. R. 405 ; S. C. 23 C. W. R. 340 ; S. C. in App. to P. C. L. R. 5 I. A. 40 ; contra *Ooman Dutt v. Kunkia Singh*, 3 C. S. D. A. R. 144, on an adoption in the kṛitrima form. See Suth. Syn. Head II. and the comment by the Judicial Committee, L. R. 5 I. A. at p. 53 ; 1 Macn. H. L. 68 ; 1 Str. H. L. 85.

(b) MS. 1628.

(c) Coleb. in 2 Str. H. L. 98. See above p. 887, Note (a).

(d) *Huebatrav Mankar v. Govindrav Mankar*, 2 Borr. 75. (83 2nd Edn.) See Vyav. May. Chap. IV. Sec. V. paras. 17, 18, 19 ; Datt. Mīm. Chap. II. 29, 73 ; Datt. Chand. Chap. I. 20, 27, 28 ; Manu. XI. 182 ; Mit. Chap. I. Sec. XI. paras. 36 ss.

(e) . . . . . "They (the Śhāstrées) said, a widow can, by her husband's injunction, adopt a son, but not without it, but the prohibition is meant against her taking any other person when the son of her husband's brother exists, whom she may adopt even without such injunction ; for from the words (of Manu, Chap 9th, v. 182, quoted by the Zillah Śhāstrées) found in the Mitāksharā, book second, leaf 55th, page 1st, line 3rd, it appears, that even without the injunction of her husband, a widow may adopt the son, either of her husband's eldest, or youngest, brother." 2 Borr. 99.



Even amongst the lower castes a Śāstri said—

“The deceased husband’s brother’s son should be adopted by a Śūdra widow. Failing him she may take any one of the caste junior to the adopter.” (a)

“Though the deceased husband desired that the son of his brother should be adopted, and the brother is willing to give his son—which the Vyavahāra Mayūkha allows, though sinful, (b)—yet the widow is not under such circumstances obliged to take such a son. In taking the son of some other relative however she must have the assent of the relatives.” (c)

In one case the Śāstri said that a widow cannot adopt her deceased husband’s first cousin. (d) But this was founded on his notion that the adoption of a brother’s son was obligatory. In himself a first cousin of the deceased is a proper person to adopt in the absence of a nearer relative, i.e. a nephew. (e) In Bengal it was said that whatever the preference due to a brother’s son it did not prevent a resort elsewhere if that son were refused. (f) The same is the law of several Poona castes. (g)

## 2. 3.—RELATION BETWEEN THE SON TO BE ADOPTED AND THE ADOPTIVE FATHER THROUGH THE SON’S NATURAL MOTHER.

Contrary to the rule by which the connexion with the adoptive through the natural father gives at least a religious claim to preference to the boy thus related, a near connexion through

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(a) MS. 1675.

(b) i. e. the only or eldest son. It does not condemn the gift generally. See Vyav. May. Chap. IV. Sec. V. 9, 19.

(c) MS. 1644.

(d) MS. 1703.

(e) MS. 1660.

(f) *Gokoolanund Doss v. Musst. Wooma Daee*, 15 B. L. R. 405, 416; S. C. 23 C. W. R. 340, 341; S. C. L. R. 5 I. A. 40.

(g) Steele, L. C. 189.

the boy's mother usually makes adoption impossible. The doctrine of the imitation of nature prevents a man's standing in the relation of adoptive father to a son whom he could not have begotten without incest according to the religious law. The prohibited degrees however, though observed with strictness by the higher castes, have been little regarded by the Śūdras. The unions of the latter have not been looked on as having any sacred character, and the means seldom exist amongst them of tracing quasi-gotra relationships to any considerable distance. The aboriginal custom of making a sister's son heir (a) was thus readily moulded to the needs of a system of adoption, while the daughter's son growing up in the grandfather's house naturally took the place of the appointed daughter's son and became recognized, when some inclusion within the law of adoption was felt necessary, as a fit subject for adoption. (b)

The opinion of the Śāstris in the case of *Haebut Rao Mankar v. Govindrao Bulwantrao Mankar* (c) declares a son of a daughter, a sister, or a mother, ineligible for adoption, except amongst Śūdras. (d) Three at least of the nine Pandits consulted in the case (e) pronounce expressly against the adoption of a daughter's or a sister's son. The other six

(a) See above, pp. 289, 421, and the *Mankars'* case, 2 Borr. at pp. 95, 96, 106, 107.

(b) "Adoption of a sister's son is strictly prohibited unless in the case of Śūdras." Ellis, who refers to the *Datta Kaustubha*,—but this allows such an adoption in case of necessity, see below. He says the *Datta Mimāṃsa* of Sri Ram admits this in case of necessity, and that in practice it is not uncommon in all castes. 2 Str. H. L. 100, and Stokes, H. L. B. 553. "Not regarding the putrika-putra as a subsidiary son, his affiliation (it would not be unreasonable to infer) would be valid in the present age." Sutherland, 2 Str. H. L. 201. See also Sutherland's Syn. Note I.

(c) 2 Borr. 106.

(d) Macn. Cons. H. L. 149, 154; 1 Str. H. L. 71; 2 ib. 77. See above, pp. 886, 887.

(e) 2 Borr. R. at p. 106.

give no opinion on this particular point. A similar opinion to that of the three is expressed by the Śāstri above, p. 434, Q. 6.

The general principle has been recognized in many decisions of the Courts that adoption is prohibited where the adopter could not marry the mother of the boy proposed for adoption in her maiden state. (a) It has equally been recognized that the rule is not binding on Śūdras. Thus it has been held that a Lingāyat (as being a Śūdra) may adopt a sister's or a daughter's son, but a member of a higher caste may not, in the absence of a special custom. The doctrine of *factum valet* does not validate such an adoption. (b)

The adoption of a brother was disallowed in Madras. (c)

The adoption of a sister's son is invalid, according to the decisions, as it imports incest not only among Brahmins, (d) but generally in the three regenerate classes, except perhaps the Vaiśyas (e); in the Dravida country (f); in the Andra country (g); in the North-Western Provinces. (h)

(a) *Shrinivas Timaji v. Chintaman Shivaji*, S. A. 587 of 1866; *Jivanees Bhayee v. Jivu Bhayee*, 2 M. H. C. R. 462; *Sriramulu v. Ramayya*, I. L. R. 3 Mad. 15.

(b) *Gopal N. Safray v. H. G. Safray*, I. L. R. 3 Bom. 273, 298.

(c) *Muthuswamy Naidu v. Latchmeedavamma*, M. S. D. A. R. for 1852, p. 96. See above, p. 968.

(d) Datt. Mim. II. 91-93; Datt. Chand. I. 17; 2 Str. H. L. 100; *Doddem Kora Shunko Takoor v. Bebee Munnee*, East's Notes, Case 20; 2 Morl. Dig. p. 32; *Nursing Narain v. Bhutton Loll*, Sp. No. C. W. R. 194. This case pronounces against the legality of the putrika-putra in the present day.

(e) *Ramalinga Pillay v. Sadasiva Pillay*, 9 M. I. A. 506; S. C. 1 C. W. R. 25 P. C. The Vaiśyas are only partially recognized. See Steele, L. C. 90.

(f) *Gopalayyan v. Raghupatiayyan*, 7 M. H. C. R. 250.

(g) *Narasammal v. Balaramacharloo*, 1 M. H. C. R. 420.

(h) *Luchmeenath Rav v. Musst. Blima Bae*, 7 N. W. P. R. 441, 443.

In the Punjab the objection to sisters' or daughters' sons arises from their taking the property into another got. The consent of the male relatives therefore is required. Punjab Customary Law, II. 156.

"If a Prabhu cannot obtain a son of his own gotra he may take from another, except the son of a sister or daughter." (a)

The husband's brother's grandson (grand-nephew) may be adopted, as the adoptive father could have married the nephew's wife in her maiden state. (b)

The adoption of a first cousin's daughter's son having been recognized for a long time, was upheld. (c)

An adoption by a Brāhman of his daughter's son was pronounced invalid, though it was strongly asserted in the particular case to be in accordance with the custom which prevailed among the caste. A few instances to the contrary, adduced to prove a special custom holding such adoptions valid, were set aside as insufficient by the Bombay High Court. (d) A special custom, favouring adoption of a sister's son in the Dravida country by Brāhmans, was similarly refused recognition by the Court. (e) The subordination of particular usages to the general customary law is discussed in the *Naikins'* case. (f)

(a) MS. 1613. As to the Parbhus, see Steele, L. C. 89, 94.

(b) *Morun Moyee Debia v. Bejoykisto Gossamee*, Cal. F. B. R. 121.

(c) *Lakshmapya v. Ramapa*, Bom. H. C. P. J. F. for 1873, p. 59. This case, from the Southern Maratha Country, was disposed of conformably to the laxness of the law there as to prohibited degrees already noticed.

The legality of marriage between an uncle and niece was denied in *Ramanagavda v. Shivaji*, Bom. H. C. P. J. 1876, p. 73 (the parties being apparently Lingayats of the Southern Maratha Country), but an application for review (*ib.* p. 154) was dismissed on the ground that the suit was barred by limitation.

(d) *Gopal Narhar Safray v. Hanmant Ganesh Safray*, I. L. R. 6 Bom. 109. This case illustrates the difficulty of establishing a particular custom of a caste or sect diverging from the general law. It will be seen below that there is considerable authority for the practice.

(e) *Gopalayyan v. Raghubatiyyan*, 7 M. H. C. R. 250.

In the Panjab, it may be noticed, adoption may be made of a relative through a female. See Tupper, Panj. Customary Law, vol. II., p. 111.

(f) I. L. R. 4 Bom. at p. 557 ss.

"A (Śūdra) widow may adopt her husband's sister's son," (a) as the husband himself could have done.

A sister's son is incompetent to question an invalid or illegal adoption on the part of his maternal uncle in Benares (b) and in Maithila. (c)

As to the daughter's son the Śāstris have said: "A Brāhman cannot adopt his daughter's son;" (d) and "The adoption of a daughter's son is invalid. Though Pandits differ, the texts do not differ." (e) Again, to a question whether a daughter's only son could be adopted by her father in pursuance of an agreement with her husband at the time of marriage, the Śāstri says only "the adoption of a daughter's son is forbidden." (f)

On the other hand the Pandits of the Poona College on the authority of the Śaṃskāra Kaustubha and the Nirṇaya Sindhu admitted the adoption of a daughter's or a sister's son in default of boys available within the adoptive father's own gotra. (g)

In the South Marāṭha country the customary law allows the adoption of a daughter's son with the consent of the kindred of the adopter. (h)

(a) MSS. 1622, 1706. The parties, though the caste is not explicitly stated, must have been Śūdras.

(b) *Thakoorain Saluba v. Mohun Lall*, 11 M. I. A. 386.

(c) *Musst. Mooneea v. Dhurma*, 11 M. I. A. 393.

(d) MS. 1638.

(e) *Jivanee Bhayee v. Jivu Bhayee*, 2 M. H. C. R. 462; *Nursing Narain v. Bhutton Lall*, Sp. No. C. W. R. 194.

(f) MS. 1633. This question indicates a clinging to the ancient institution of the putrika-putra. See above, pp. 877, 886, 888.

(g) Steele, L. C. 44. See above, p. 887; 2 Borr. 95, 96.

(h) Steele, L. C. 183.

The fitness of a daughter's son for adoption, where it is recognized by the higher castes, may be traced either to the institution of the appointed daughter (see above, pp. 896, 887) or to the imitation of their low caste neighbours at the prompting of natural affection.

It is valid in Saraogi Agarvali caste, which is a sect of the Jains. (a)

The son of a woman adopted by her paternal uncle was pronounced entitled to the management of business as Muttadar Patel, while the widow of the deceased nephew was pronounced heir to his property. (b)

In *Somasekhara v. Subhadramâji* (c) the Court declined to express an opinion on the validity of an adoption of a son whose mother was second cousin of the adoptive father. As a marriage would have been impossible between the real mother and the adoptive father the adoption would be invalid judged by that test. Where the adoption of a sister's or a daughter's son is allowed the test seems inapplicable. In the South, whence the case came, marriage with a sister's daughter is common even amongst Brâhmans, and custom is, to say the least, lax in restricting adoptions. It would seem therefore that the adoption in question was not open to objection on the ground of prior family connexion between the parties.

In one case (d) the opinion seemed to be held that a man could adopt his wife's sister's son, but that this had been invalid in the particular case as tending to deprive the heirs of their right of succession. (e)

There is of course less objection to the adoption of a father's brother's son or a mother's brother's son than to adopting a father's sister's son or a mother's sister's son. (f)

(a) *Sheo Singh Rai v. Musst. Dakho*, N. W. P. H. C. R. 382.

(b) MS. 5. Nothing is said of the caste, or of division or non-division. Division and Śūdra caste seem to be assumed. If the widow of the nephew had adopted a contest might have arisen such as is referred to at p. 995 note (a).

(c) I. L. R. 6 Bom. 524.

(d) *Bae Gunga v Bae Sheeshunkur*, Bom. Sel. R. 73.

(e) This case is discussed above, p. 942.

(f) *Shrinivas Timaji v. Chintaman Shivaji*, S. A. 587 of 1866. See Datt. Mīm. II. 107, 108.

#### 2. 4.—RELATION BETWEEN THE SON TO BE ADOPTED AND THE ADOPTIVE MOTHER.

The principle of an imitation of nature operates, though less conspicuously, in the case of a blood connexion between the proposed adoptive mother and son as between the adoptive father and son.

In the earlier form of the law as the relation of the adopted son to his adoptive mother was merely incidental, the doctrine of a possibility of union between her and the real father seems not to have been developed. It grew up as natural feeling gradually gave to the adoptive mother, as compared with the adoptive father, a more and more important relation to the child whom they brought up as their own. Then as the condition was accepted of a possible union of the real mother with the ideal father to produce the adopted son, a corresponding notion was suggested of a similar necessary relation between the ideal mother and the real father. (a) Thus it came to be admitted, though not at all universally, that where the real father and the adoptive mother could not, without incest, have joined in procreating the boy, he is not a fit subject for adoption. (b) Such at least is the rule followed by most of the authorities. Others are more indulgent. A deceased wife's connexion with the family whence the boy is to be taken is not recognized as an obstacle to his adoption. This may be taken as a sign of the imitative character of the doctrine. The relation of a deceased adoptive father to the real mother is an obstacle in the same cases as if he were alive, but on the other side the imitation has not proceeded beyond the relation of an adoptive mother still living.

(a) See above, p. 881. In a footnote at 1 M. H. C. R. p. 427 to *Narsammal v. Balarama Charlu*, *ib.* 420, several cases are quoted to show that there must have been a possibility of legal union between the adoptive father and the real mother. One is cited from Macn. Cons. H. L. 170, to show the need of a similar relation between the adoptive mother and the real father.

(b) Datt. Mīm. Sec. II. 32, 33. The living wife must (religiously) join in an adoption. As a widow she adopts to her husband, but he surviving does not adopt to her.

The following responses of the Śāstris illustrate what has just been said:—

“A Brāhman widow cannot adopt her own brother’s son.” (a)

“The adoption by a widow of her brother’s son is illegal, either before or after investiture.” (b)

“A widow is not allowed by the Vyavahāra Mayūkha and the Kaustubha to adopt her brother’s son”; but the Śāstri pronounced the adoption valid on the authority of the Dvaita Nirṇaya. (c)

“A wife’s brother cannot be adopted, as he would become her adoptive son as well as the adoptive father’s.” (d)

The adoption by a widow [Brāhman] of her own uncle’s son is not valid. (e)

In several instances the fitness for adoption has been pronounced on solely by reference to the connexion between the boy’s real mother and his adoptive father, when the only question under the Hindū law was whether the relation between the real father and the adoptive mother prevented a valid adoption. The Dharmadvaita Nirṇaya allows the adoption of the wife’s blood relatives, but this is opposed to the general sense of the authorities (f) as regards the higher castes. The two following cases will serve for further illustrations.

(a) MS. 1635.

(b) MS. 1615.

(c) MS. 1761. Above, p. 862.

(d) MS. 1619.

It is plain that the real father and his daughter, the proposed adoptive mother, could not legally have been parents of the boy. See above, p. 883.

(e) *Dagumbaree Dabee v. Taramony Dabee*, 1818; Macn. Con. H. L. 171.

(f) See Datt. Mim. Sec. II. 33, 34.



In the first it was ruled that the adoption of a wife's brother is valid, (a) as the adopter could have legally married adoptee's mother in her maiden state. (b)

In the second it was laid down that—

1. The son of a wife's brother may be adopted.
2. The rule of Hindû law that a legal marriage must have been possible between the adopter and mother of the adoptee refers to relationship prior to marriage.

3. This rule has nothing to do with the case of a step-mother in her virgin state, accordingly a half-brother cannot be adopted. (c)

When the connexion between the propositus and the intended adoptive mother arises through the boy's mother, such a relation creates no obstacle to adoption. Two sisters or two female cousins could not possibly be parents of the same boy, so that the ceremonial relation does not in this case imitate anything legally impossible.

Thus a man may adopt his wife's sister's son. (d)

"A widow may adopt her sister's son if this be consistent with the custom of the caste." (e)

## 2. 5.—FAMILY CONNEXION WITH THE ADOPTIVE PARENTS AMONGST ŚŪDRAS.

It has been pointed out (f) that the practice of adoption amongst the lower castes is probably a mere graft of Brāhmanical usage upon a primitive stem of a very different kind.

(a) *Runganaigum v. Namasevoya Pillai*, M. S. D. A. Dec. 1857, p. 94.

(b) *Kristniengar v. Venamamalai Jyengar*, M. S. D. A. Dec. 1856, p. 213.

(c) *Śriramulu v. Ramaya*, I. L. R. 3 Mad. 15. The sense of this is that though the particular restriction would not operate, another one does, which prevents an allowance of adoption which would otherwise follow.

(d) 2 Str. H. L. 106.

(e) MS. 1708.

(f) Above, pp. 922 ss.

The result shows signs of this composite origin. The aboriginal tribes had a family system of their own, which in some form they must retain. The marriage of first cousins, marriage of an uncle and niece, heirship of a sister's son, reception of a daughter's husband as quasi-son when there was no real son in the way; for all these and other customs room had to be found in the Bráhmancial system before the uncivilized converts could be subdued to it. (a) Similarly in the case of adoption the practice of succession of a sister's and of a daughter's son had to be admitted; it was brought within the general system by widening the gateway of adoption in the case of Śúdras, who in their turn were so far influenced by the ideas of their more intellectual neighbours, that in most cases they gradually accepted adoption as necessary to fully constitute the heritable right. (b) Concurrently with these changes vicarious sacrifices were allowed (c) for those who, under the antique scheme of religion, were wholly excluded from spiritual benefits. (d) Adoption became ceremonial, yet not so essentially ceremonial but that a giving and taking might be effectual without symbolical acts, or sacrifices, or recitation of sacred formulas. (e) The customs springing from natural loathing of incestuous unions were referred to the principle of the family and gotra as conceived by the twice-born; and even spiritual benefits, it became dimly recognized, might be secured through the proper ministers by the low-caste son for his low-caste father. Still the marriage and the adoption of a Śúdra could never be regarded by the depositaries of the sacred traditions but with a kind of contempt. It was of little consequence in their eyes whether purity from physical or spiritual conta-

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(a) See above, pp. 886, 888.

(b) Comp. p. 919.

(c) Comp. *Manu* X. 126, 127.

(d) Above, pp. 901, 919, 929; 2 Str. H. L. 263.

(e) See above, pp. 920 ss.

mination was preserved amongst people who had no devolution of sacra as contemplated in the Veda, (a) and with whom there was no association on the part of the higher classes that would not honour them. Thus the disdain inspired by caste feeling joined with the desire of gain and of importance to make the Brāhmins admit Śūdra adoption with the peculiarities that it still presents. Whether in those cases in which the Brāhmins themselves follow usages generally peculiar to the lower castes this is to be ascribed to a special development of their own original system or to the mere influence of a majority rising gradually in the social scale (b) is a question which cannot at present be answered very decisively. It seems likely that in some cases at least there has been a mixture of classes and of customs which descendants aiming at a higher rank have set themselves to forget as completely as possible. (c)

Some instances have already been given of the relaxation of the ordinary rules of adoption in favour of Śūdras as contrasted with the higher castes. Several other points are brought out by the opinions and the decisions, the chief of which are the following:—

Consanguinity does not invalidate an adoption where the parties involved do not belong to any of the three regenerate castes. (d)

(a) Datt. Mīm. II. 80.

(b) See above, p. 922.

(c) See above, p. 895. It is not a very unusual thing for a man of dubious caste position, who has got up in the world, to assume the sacred thread which he never wore before. A story is got up of his connexion with a regenerate caste much as a pedigree is made to order in Europe, and Brāhmins are not wanting to perform the rites of investiture. It has sometimes even been a matter of discussion in a caste whether though hitherto uninvested they might not assume the thread and claim rank at least as Vaiśyas. The expense of the ceremonies stands in the way. See further below, Sec. VI. D. 1. 2.

(d) *Nunkoo Singh v. Purn Dhum Singh*, 12 C. W. R. 356.

“ A Śūdra may adopt a sister’s son.” (a)

“ A Śūdra only may adopt a sister’s or daughter’s son.” (b)

“ A brother’s or sister’s son may be adopted by a sister or brother amongst Śūdras only.” (c)

“ A Lingāyat may adopt his daughter’s son.” (d)

In the Bombay presidency it might seem from the case quoted below that the adoption of a sister’s son by a Vaiśya was allowed, (e) and the language of the judgment is so general as to extend to all classes, but the parties were in fact Lingāyats, and Lingāyats are Śūdras, (f) amongst whom no doubt the sister’s or the daughter’s son is the most proper for adoption. (g) The Śūdra is bound to adopt a daughter’s or a sister’s son according to the Mayūkha if one is available. (h) This obligation however cannot probably be ranked higher than the ordinary one to adopt the son of a near sapinda which has been pronounced to be merely religious or discretional. (i)

In a Madras case it was said in argument before the Judicial Committee that the parties were Vaiśyas. (j) If they were the decision is an authority for the legality of a Vaiśya’s adopting a sister’s son in that province, but it would be desirable to have had the caste more satisfactorily established.

(a) MS. 1749.

(b) MS. 1636.

(c) MS. 1672.

(d) MS. 1641. The Śāstri quotes Vyav. May. Chap. IV. Sec. V. 9, which relates to Śūdras.

(e) See *Gunpatrao v. Vithoba*, 4 Bom. H. C. R. 130 A. C. J.

(f) See below, and I. L. R. 3 Bom. 273.

(g) Above, p. 920.

(h) Above, pp. 919, 920; Datt. Mīm. II. 74 ss.

(i) Above, p. 887, Note (a); Datt. Mīm. Sec. II.

(j) *Ramalinga v. Sadasiva Pillai*, 9 M. I. A. 506; S. C. 1 C. W. R. 25 P. C.

It is allowed amongst Jains as a law of the caste. (a)

The adoption of a sister's son allowed in Bengal in a case noted below (b) was afterwards pronounced invalid there (c) though allowed in Maithila. (d)

A Śūdra's widow having adopted her daughter's illegitimate son, the latter was pronounced heir both as grandson and as adopted son. (e)

"A Wāni, being a Śūdra, may adopt his sister's son." (f)

"Adoption of a first cousin is forbidden among Śūdras" (there having been apparently a sister's or a daughter's son available). (g)

The adoption of a mother's sister's son is valid among Śūdras. (h)

Apart from the indulgence conceded as to the adoption of sons of female blood relatives, the rules of adoption amongst the Śūdras as to the choice of a boy do not differ essentially from those of the other castes. The necessity, whether legal or religious, of taking the nearest relative in preference to the more remote, or to a stranger, is hardly dwelt on by the Śāstris, and is treated in practice merely as a counsel of perfection, which may be followed or disregarded. Many castes, which are really sub-divisions of the Śūdra class, decline to recognize this, and affect in some particulars the customs of the twice-born, as in the case of the closer relations which prevent adoption. The remoter

(a) *Hasan Ali v. Naga Mal*, I. L. R. 1 All. 288.

(b) *Macn. Consid. H. L.* p. 167.

(c) *Doe dem Kora Shunker v. Bebee Munnee*, East's Notes, Case XX.; 2 Morl. Dig. p. 32.

(d) *Chowdree Purmessur v. Hunooman Dutt*, 6 C. S. D. A. R. 192.

(e) MS. 236.

(f) MS. 1624.

(g) MS. 1618.

(h) *Chinna Nagayya v. Pedda Nagayya*, I. L. R. 1 Mad. 62.

relations are hardly recognized, but adoptions seem to be generally forbidden (a) which would involve a kind of absurdity, as *ex. gr.* the adoption of an uncle or one older than the adopter. (b)

“A Mhar may adopt a cousin’s son in preference to a brother’s son.” (c)

A Hindû may adopt an asagotra among the Śûdras. (d)

“A Śûdra may adopt from an illegitimate branch of his family, though there be eligibles of a legitimate branch.” (e)

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### 3.—RELATION OF THE SON TO BE ADOPTED TO HIS FAMILY OF BIRTH.

The considerations which make it unlawful to give an only son in adoption have already been dwelt on. (f) The case of the eldest son also has been discussed. (g) The decisions and opinions are given below. The relation next to these in practical importance is that of the orphan. (h) The svayamdatta or son self-given is, as we have seen, (i) not recognized in the present age, and the Śâstris have disallowed the adoption of a man otherwise eligible, because his parents having died there was no one who could give him in adoption. (j) The giving by an eldest brother as head of the family,

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(a) Steele, L. C. 184.

(b) *Op. cit.* 388.

(c) MS. 1630.

(d) *Rungamah v. Atchummah et al*, 4 M. I. A. 1; S. C. 7 C. W. R. 57, P. C.; *Lakshmappa v. Ramava*, Bom. H. C. P. J. 1875, p. 394; S. C.; 12 Bom. H. C. R. 364. See above, p. 920, and 2 Str. H. L. 89.

(e) MS. 1646.

(f) Above, p. 912.

(g) Above, p. 915.

(h) Above, p. 894.

(i) Above, p. 895.

(j) P. 930; *Balvantrao v. Bayabai*, 6 Bom. H. C. R. 83 O. C. J.; *Bashetiappa v. Shivalingappa*, 10 Bom. H. C. R. 268.

though there is some authority for it (a) amongst the castes, is not contemplated by the sacred formulas, and has been condemned by high authorities. (b)

The ceremonies of adoption are equally unadapted to the gift of an adopted son, and such a gift is not contemplated by the Hindû law. The adopted son must generally be an only son, but even when a son has been born there is no formula adapted to the purpose of transferring the adopted son (c) to another family. There is none even for restoring him to his family of birth. (d)

### 3. 1.—RELATION OF SON TO BE ADOPTED TO HIS FAMILY OF BIRTH—AN ONLY SON.

An only son, an eldest or a youngest son, ought not to be given in adoption. (e) An exception is made where the adoption is made by a paternal uncle or his widow, the children of brothers being considered as one family. (f)

An only son desiring to be adopted it was answered that this was prohibited. (g) And again "adoption of an only

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(a) *Veerapermal v. Narain Pillai*, 1 Str. R. 91.

(b) See p. 930. Macn. Cons. H. L. 207, 228; 1 Morl. Dig. p. 19.

(c) See above, p. 896.

(d) See above, p. 930, Note (g), and below, Sec. VII.

(e) Above, p. 909; and below, Sub-sec. 3. 2.

(f) Steele, L. C. 45; Manu IX. 182 goes equally to show the needlessness of any adoption when a brother has sons, and with this many caste customs agree, but a different application has been given to it. See above, pp. 897, 909, 912. "The Smṛiti writers and great commentators . . . all seem to be of one accord on the incapacity of a father to give his only son in adoption." Per Sir M. Westropp, C. J., in *Lakshmappa v. Ramava*, 12 Bom. H. C. R. at p. 380. For the exception made by the Datt. Mim. see above, p. 913; Datt. Chand. I. 28-30.

(g) MS. 1614. See above, p. 909.

son is invalid," (a) and "the Smritis prohibit the adoption of an only son." (b) "A man cannot give his only son in adoption and replace him by adopting another." (c)

The adoption of an only son is invalid generally (d) in Bengal, (e) the prohibition extending to all classes, Sûdras inclusive. (f) An only son may be given as a dvyâmushyâyana, but not on any other terms of filiation. (g)

The adoption of an only son was similarly pronounced invalid in Behar. (h)

(a) MSS. 1623, 1626. The Vivâda Chintâmani, asserting the general right of parents to sell, give, or desert a son, excepts the only son, who it says, relying on Vasishṭha, must neither be given nor taken. Transl. p. 74.

(b) MS. 1631. So the Mit. and the Datt. Mîm. according to Coleb. 2 Sr. H. L. 88. He excepts a brother's son taken as a dvyâmushyâyana, p. 107. See Datt. Mîm. II. 38; IV. 1 ss.

(c) MS. 1632.

(d) *R. Shumshere Mull v. Ry. Dilraj Konwar*, 2 C. S. D. A. R. 169.

(e) *R. Upendra Lal Roy v. Sy. Ry. Prasannamayi*, 1 Beng. L. R. 221 A. C. J.; S. C. 10 C. W. R. 347; *Nilmadhab Dass v. Biswambhar Dass*, 12 C. W. R. P. C. 29; S. C. 3 Beng. L. R. P. C. 27; S. C. 13 M. I. A. 85.

(f) *Manick Chunder Dutt v. Bhuggobutty Dossee*, 1. L. R. 3 Calc. 443; 2 Macn. H. L. 179. The adoption of an only son, it was said, is valid, but the giver and receiver incur sin (*Sy. Joymony Dossee v. Sy. Sibosoondry Dossee*, 1 Fult. 75; *Tanjore Raja's case*, 1 Str. Rep. 126; *Vishram Baboorav v. Narrain Raw Kasee*, 4 Morris 26), unless he be given as a dvyâmushyâyana. This however cannot be regarded as the Hindû law of Bengal or Benares., *Dabee Dial et al v. Hurhar Sing*, 4 C. S. D. A. R. 320; see *Lakshmappa v. Ramasa*, 12 Bom. H. C. R. at p. 393. See above, pp. 910, 911, for the cases in which the gift of an only son has been allowed.

(g) *Raja Shumshere Mul v. Ranee Dilraj Koer*, 2 C. S. D. A. R. 169.

(h) *Nundram v. Kashee Pande*, 3 C. S. D. A. R. 232; 4 C. S. D. A. R. 70; 2 Macn. H. L. 179. See above, pp. 909—912.



In Madras however such an adoption has been held valid, (a) and also in the North-West Provinces. (b) The principle was applied in these cases of *factum valet*. (c) The Sāstris in the N. W. Provinces held a different opinion; they pronounced the adoption of an only or an eldest son invalid. (d)

When two or more sons have been reduced to one by death or gift in adoption that one ranks as an only son. (e) The only surviving son cannot be given though he be not the firstborn.

The caste laws in Bombay are almost without exception opposed to the adoption of an only son. The only exceptions allowed, save in a few castes, are to provide a childless uncle with a son to inherit his self-acquired property or to succeed to his vatan. In about six castes the adoption is allowed as a means of preserving the family property, an object substantially the same as in the preceding case. In only four or five castes is the adoption of an only son allowed at the discretion of the parties; and these are castes of no importance. (f)

Among Śūdras of the Lingāyat caste, an only son cannot be given in adoption. (g) The husband's authority is not to be presumed to such a gift by a widow.

(a) *Chinna Gawndan v. Kunara Gawndan*, 1 Mad. H. C. R. 54.

(b) See above, p. 910.

(c) *Hanuman Tiwari v. Chirai et al*, I. L. R. 2 All. 164.

(d) Vyavastha, Agra 1861.

(e) 2 Macn. H. L. 178, *Lakshmappa's case*, 12 Bom. H. C. R. at p. 381.

(f) Steele, L. C. 385.

(g) *Somasekhara Rāja v. Subha Drāmaji*, I. L. R. 6 Bom. 524, referring to *Lakshmappa v. Ramava*, 12 Bom. H. C. R. 364. At p. 909 Note (b) the case of *Bayabai v. Bala Venkatesh*, 7 Bom. H. C. R. App. i. has been mentioned by mistake for *Mhalsabai v. Vithoba*, *Id.* xxvi. as overruled by *Somasekhara's case*, I. L. R. 6 Bom. 524.

There have been a few cases in which the adoption of an only son has been recognized even in Bombay. (a) But these must now, it seems, be regarded as overruled, and the adoption as impossible save by an uncle, except by special caste custom. (b) A Śāstri said—

“Caste custom will authorize the giving of an only son in adoption.” (c) And another answered—

“An only son cannot be given in adoption; but there is no express provision for setting aside an adoption made with the due ceremonies.” (d) “The Vyavahāra Mayākhā and Viramitrodaya,” the Śāstri says on another occasion, “forbid the adoption of an only son, but Nagoji Bhaṭ’s treatise allows it in case of necessity.” (e)

The doctrine of *factum valet* has, in some few instances, been supposed to give efficacy even in Bengal (f) to an adoption wholly condemned by the law of that Province. The adoption of an only son, though criminal, cannot perhaps be set aside, (g) it was said. But the castes in Bombay set aside invalid adoptions, and where the transaction was essentially void the mere ceremony cannot make it

(a) *Abaji Dinkar v. Gungadhur Wasoodev*, 3 Morris S. D. A. R. 420, 423; *R. Vyankatray v. Jayavantrav*, 4 Bom. H. C. R. 191 A. C. J.

(b) Above, p. 909, 911; 1 Str. H. L. 85; 2 Macn. 179, 182, 195.

(c) MS. 1620. See above, p. 909.

(d) MS. 1695. As to this see above, pp. 911, 912, and the observations of Sir M. Westropp, C. J., in *Lakshmappa’s case*, 12 Bom. H. C. R. at p. 397.

(e) MS. 1633. See above, p. 912.

(f) Coleb. Dig. Bk. V. T. 273 Com. sub. init.; above, pp. 909, 912.

(g) *Nundram et al v. Kashee Pande et al*, 3 C. S. D. A. R. 232; S. C. 4 C. S. D. A. R. 70; 1 Str. H. L. 87. The effect of the case is given as stated in *Chiana v. Kumara Gaundan*, 1 M. H. C. R. at p. 57, but the point was not really decided so as to support the decision in *Fulton’s Reports*, I. 75.

effectual. (a) Sir M. Westropp, C.J., pointed out in *Laksh-mappû's* case that there was no necessity to set aside that which was in itself essentially invalid. (b) If an only son cannot be given the affected gift of him is a mere pretence.

The gift of an only son, even to a brother of his father, (c) has been condemned by some of the *Śâstris*, as in the following answers, but the taking in this way of a *dvyâmu-shyâyana* does not seem to be really objectionable. (d)

"An only son cannot," it was said, "be given in adoption to a brother." (e) "Both the giving and taking of an only son of a brother are prohibited by the *Śâstras*. The giving of an eldest is prohibited, but not the taking." (f)

In Madras it was at one time held that it was not lawful for a brother to adopt the only son of a brother in preference to his uncle's son; but in the sense that such an adoption involves both the giver and the receiver in sin, not that it is legally invalid. (g) In other cases it has been said that—

The adoption of an eldest or only son, though alien to the principles of Hindû law, is sustainable if made by a paternal uncle, (h) though not if made by another. He would generally be taken as a *dvyâmushyâyana*.

(a) See Steele, L. C. 184; Coleb. in 2 Str. H. L. 178.

(b) Above, pp. 911, 912.

(c) Above, pp. 896, 913.

(d) Above, p. 914; 1 Str. H. L. 86; 1 Macn. H. L. 71.

(e) MS. 1677.

(f) MS. 1684; 2 Str. H. L. 106, 107; comp. the Datt. Chand. Sec. I., paras. 27, 28.

(g) *Arnachellum Pillay v. Jyasami Pillay*, 1 M. S. D. A. R. 154.

(h) *Perumal Nayker v. Pottееammal*, M. S. D. A. Dec. 1851, p. 234; *Gocoolanund Doss v. Musst. Wooma Dae*, 15 Beng. L. R. 405; S. C. 23 C. W. R. 340; *Chinna Gaundan v. Kumara Gaundan*, 1 Mad. H. C. R. 54 (reviewing *Perumal Nayker v. Pottееammal*).

A dvyâmushyâyana is not recognized in the present age, (a) according to the late Sadr Court of Madras. The legality of the dvyâmushyâyana however has been recognized by the Judicial Committee, (b) and, as the cases show this form of adoption is not at all uncommon in some districts of the Bombay Presidency. The following are two instances—

“An agreement may be made at the time of adoption that the son shall represent both fathers, but without this he cannot succeed to his natural father’s property.” (c)

“If a Brâhman adopts a boy of a different gotra the presumption is that he has taken him as a dvyâmushyâyana.” (d)

The decisions seem to show that this kind of adoption is generally legal. (e) Thus:—

The only son of a brother may be adopted in Maithila. (f)

The only son of a person may be adopted by another, on condition that he becomes a son of both of them. (g) It is presumed from such an adoption (h) that the son became a dvyâmushyâyana.

(a) *Annamala Auchy v. Mungalum*, M. S. D. A. R. 1859, p. 81.

(b) See above, p. 897, 914.

(c) MS. 1692.

(d) MS. 1675. A similar presumption arises where an only son or eldest son has been given to his uncle. *Nilmadhab Dass v. Biswambhar Dass*, 13 M. I. A. 85, 101. See Datt. Mim. Sec. IV. 32. In *Chinna Gaundam's* case, 1 M. H. C. R. at p. 55, Scotland, C. J., refers to *Sy. Joymony Dossee's* case, Fult. 75, as establishing that a condition of double sonship will be presumed after adoption in every case, but that could not be so where a dvyâmushyâyana is not admitted, see above p. 898.

(e) See p. 1044, Note (g).

(f) 2 Macn. H. L. 197. The adoption was in the Kṛitrima form. As to which see below, and 7 C. W. R. 700.

(g) *R. Shumshere Mull v. Ry. Dilraj Konwar*, 2 C. S. D. A. R. 169.

(h) *Sy. Joymony Dossee v. Sy. Sibosoondry Dossee*, 1 Fult. 75; *Nilmadhab Dass v. Biswambhar Dass*, 12 C. W. R. P. C. 29; 3 Beng. L. R. P. C. 27; S. C. 13 M. I. A. 85. The presumption extended to

### 3. 2.—RELATION OF SON TO BE ADOPTED TO HIS FAMILY OF BIRTH—ELDEST SON.

The grounds of distinction between the cases of the eldest son and the only son have been discussed in a preceding section. (a) The Mitāksharā is distinctly opposed to the gift of an eldest equally as to that of an only son, (b) but the Dattaka Mīmāṃsa (c) and Dattaka Chandrika, (d) though they prohibit the gift of an only son are silent as to the eldest son. This may be taken as a tacit allowance of the adoption of such a son on the principle frequently repeated that “when there is no prohibition there is assent.” (e)

The Vyavahāra Mayūkha (f) assumes that the Mitāksharā allows the legality while it asserts the sinfulness of the gift of an only or an eldest son. It then goes on to refute the supposed permission and maintain that neither an only son nor an eldest son can be given. (g) Now it is true no doubt that Vijñāneśvara in his disquisition on the nature of property (h) dwells on its secular character and the possibility of acquiring it without reference to the ceremonial rules provided for spiritual purposes. (i) But he does not admit that acquisi-

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cases other than those of adoption of a brother's son tends to nullify the general rule, but an only son can properly be given only to his uncle as a dvyāmushyāyana. See above, pp. 896 ss.

(a) Above, pp. 914, 915.

(b) Mit. Chap. I. Sec. XI. paras. 11, 12.

(c) Sec. IV.

(d) Sec. I.

(e) Datt. Chand. Sec. I. para. 32; Vyav. May. Chap. IV. Sec. V. para. 18.

(f) Chap. IV. Sec. V. paras. 4, 5.

(g) Chap. IV. *loc. cit.* and para. 36.

(h) Mit. Chap. I. Sec. I. para. 8 ss.

(i) Comp. the Sarasvati Vilāsa, Sec. 472. And for the special character of religious gifts, Mit. Chap. I. Sec. VIII. para. 8.

tion without regard to the means produces property. (a) He regards what is unfit to be given as incapable of being taken by gift (b) and could not apparently, (c) any more than Nilkanṭha himself, hold the adoption of an eldest son valid. (d) The legal possibility of this adoption must rest on the absence of any distinct condemnation of it in the older sources of the law, and on the allowance, though a grudging allowance of it by custom, (e) and at least by implication in some writers of high authority. For the Bombay Presidency the matter may perhaps be considered closed by the recent case of *Kāshibâi v. Tâtia*, (f) which gave effect to the adoption of an eldest son.

In *Bomlingappa's* case it was held that the adoption of an eldest son was invalid in the Southern Marāṭha Country. (g) The Subordinate Judge, after consulting the Śāstri, had found this adoption good, as being that of a nephew,

(a) *Loc. cit.* para. 11.

(b) See above, p. 909. 2 Str. H. L. 433; Colebrooke *loc. cit.* shows that the Smṛiti Chandrika and the Madhaviya agree with the Mitāksharâ in regarding a forbidden gift as invalid. Compare the passage quoted Vyav. May. Chap. IX. para. 3.

(c) The sin, he says, is the parents' who give without necessity; an only son or an eldest son is not to be given at all. See Mit. Chap. I. Sec. XI. paras. 11, 12.

(d) The *Vīramitrodaya* (Transl. pp. 115, 117) is opposed to the gift of an only and of an eldest son; but says nothing of the allowance of either by *Vijñāneśvara*.

(e) See Steele, L. C. 183, where the gift of the eldest is disapproved, while the gift of the only son is forbidden.

(f) I. L. R. 7 Bom. 225. It was ruled that the adoption of an eldest son was permissible though not approved, the authorities against such an adoption being much less numerous and emphatic than those condemning the adoption of an only son. This was followed in *Jamunabai v. Raychand*, *ib.* 229; see 2 Str. H. L. 105.

(g) See 12 Bom. H. C. R. at p. 383.

and this seems to have been approved by the Sadr Court in a later case. (a)

In Bengal an adoption of the eldest of several sons is allowable. (b)

Where the adoption of an only son is allowed it follows *à fortiori* that an eldest son may be adopted, as in Madras. (c) In Bombay the opinions of the Sâstris have not been uniform. Thus it was said "an adoptive son should not be the only or the eldest son of his father." (d) "The eldest surviving son must not be given in adoption." (e) And again, "the giving of an eldest son is a sin: some hold that an only son can neither be given nor taken." (f) But on the other hand—"Though a man's eldest son be dead, the next may be given in adoption." (g) And "the eldest of several sons may be given in adoption." (h) In another case the Sâstri said "the eldest son may be given in adoption to a widow." (i)

The case of *Mhalsabai v. Vithoba*, (j) upholding the gift by a widow of her eldest son, was dissented from by Sir M. Westropp, C. J., in *Lakshmappa v. Ramava*. (k) The adoption of an eldest son is undoubtedly disapproved by

(a) *Ib.* pp. 387, 388.

(b) *Janokee Debea v. Gopaul Acharjea et al*, I. L. R. 2. Calc. 365.

(c) *See above*, p. 1042.

(d) MS. 1672.

(e) MS. 1647.

(f) MS. 1682.

(g) MS. 1685.

(h) MS. 1621.

(i) MS. 1612.

(j) 7 Bom. H. C. R. xxvi. App.

(k) 12 Bom. H. C. R. at p. 394.

Hindû law, (a) but all that it seems safe to say on the authorities is that the adoption of an eldest son is improper, not that it is invalid, (b) as is the adoption of an only son. (c)

Even by those who object to the gift of an eldest son it is admitted that if a person has by his first wife a son, and by his second wife several sons, the eldest of the latter may be given or received in adoption. (d) It is also recognized that the subsequent death of the elder son does not render invalid an adoption of a second son in the lifetime of the elder son. (e)

### 3. 3.—RELATION OF SON TO BE ADOPTED TO HIS FAMILY OF BIRTH—YOUNGEST SON.

The Dakhan castes disapproved the gift of the youngest son out of three or more, (f) and a doubt seems sometimes

(a) *Nilmadhab Dass v. Biswambhar Dass*, 12 C. W. R. P. C. 29; S. C. 3 Beng. L. R. P. C. 25; S. C. 13 M. I. A. 85; *Jugbundoo Bun Sing v. Radusham Narendro*, C. S. D. A. R. for 1859, p. 1556. An eldest son cannot be given in adoption according to Mit. Chap. I. Sec. XI. p. 21; Coleb. 2 Str. H. L. 105. So Ellis, *ib.*, who says some authorities make exceptions. The eldest son of a brother, however, may be adopted (1 Str. H. L. 85) as an adult.

(b) *Debee Dial et al v. Hurhor Singh*, 4 C. S. D. A. R. 320; *Veera-permal Pillay v. Narain Pillay*, 1 Str. R. 91; Coleb. Dig. Bk. V. T. 273 Com.; Mit. Chap. I. Sec. XI. para. 12; 2 Str. H. L. 81, 105; Vyav. May. Chap. IV. Sec. V. para. 4.

(c) Datt. Mim. Sec. IV. 1 ss.; Datt. Chand. Sec. I. 29, Sec. III. 17; Steele, L. C. 183; 2 Macn. H. L. 182, 195; Macn. Cons. H. L. 126, 146, 147; 2 Str. H. L. 105.

The references show a general condemnation of the giving of an eldest son, but less decisive and unanimous than in the case of an only son.

(d) *Veera-permal Pillay v. Narain Pillay*, 1 Str. R. 91.

(e) *Musst. Dullabh De v. Manee Bibi*, 5 C. S. D. A. R. 50; *Nilmadhab Dass v. Biswambhar Dass*, 12. C. W. R. P. C. 29; S. C. 3. Beng. L. R. P. C. 27; S. C. 13 M. I. A. 85.

(f) Steele, L. C. 183, 384.



to have been felt as to the lawfulness of such a gift. It is not however condemned by any recognized authority. A Śāstri's response on a case submitted to him was "The youngest son may properly be given in adoption to a man of a different gotra. The Śāstras forbid giving an eldest but not a youngest son." (a)

### 3. 4.—RELATION OF THE SON TO BE ADOPTED TO HIS FAMILY OF BIRTH—AMONGST ŚŪDRAS.

Although the gotra relation in its stricter sense does not subsist amongst Śūdras, yet propinquity is recognized as giving rise to certain connexions and restrictions which coincide in a measure with those that prevail amongst the higher castes. (b) Through the gradual attraction and reception of the Śūdras within the Brāhminical religious system (c) the relation of a son to his father has with many come to be regarded as involving a position and duties analogous at least to those of the Brāhman. (d) The father being thus concerned in the rites to be celebrated by his son (e) the same rules which guard against the loss of these benefits amongst the other classes ought equally or almost equally to operate amongst Śūdras. (f) This may be thought to have been secured for Bombay by the most recent decision on the point. "There is not in the books any ground for drawing any distinction between Śūdras and other classes on

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(a) MS. 1677. In the *Mankars'* case, 2 Borr. R. at p. 95, the Śāstris say a father is bound to keep his eldest and youngest sons, but for the latter part of the rule no authority is cited.

(b) Datt. Mīm. Sec. II. 80.

(c) Above, p. 924.

(d) See above, pp. 921, 922.

(e) See Steele, L. C. 225. The Jains do not celebrate the *kriya* ceremonies, and amongst them adoption must be referred to a different basis. See Steele, L. C. 416; above, pp. 922.

(f) See Steele, L. C. 413, 414.

the question of the legality of the adoption of an eldest or only son." (a) The Śāstris hold the same view. Thus one replied "an adoption of an only son (Lingāyat) must be set aside." (b)

The adoption by a Śūdra of an only son as a kartā putra is allowed by the Hindū law (c) in Bengal. A similar view was taken in Bombay by Sir M. Sausse, C. J., (d) but it was opposed to the opinion of the Śāstri (e) and has not been followed.

(a) Per Sir M. Westropp, C. J., in *Lakshmappa v. Ramava*, 12 Bom. H. C. R. at p. 390.

(b) MS. 1747. See above, pp. 886—888.

(c) *Musst. Tikdey v. Lallu Hureelal*, Suth. R. for 1864, p. 133. The term kartā putra is used as a synonym for kritrima putra.

(d) *Mhalsabai v. Vithoba*, 7 Bom. H. C. R. xxvi. App.

(e) "In Mayūkha, a Smṛiti (recollection) of (the sage) Vasishṭha is thus (given):—

'One, meaning perhaps an "only" son, is neither to be given nor received.' The meaning of this Smṛiti is written by the author of *Mitāksharā* thus:—'The prohibition regarding one (only) son applies only to the giver. Nevertheless this meaning of the author of the *Mitāksharā* is not consistent with what is the plain meaning of the Smṛiti passage. Therefore, the giving of one (only) son seems to be prohibited. Now among Śūdras, if a mother gives her son, of age, to her brother to be adopted, there is no objection. So it is stated in Mayūkha. May this be known to the Khudāvans (divine personages).

"AUTHORITIES.—Mayūkha p. 107, line 7 :—'One (only) son should neither be given nor received, (because) he saves persons.' (The Shāstra meaning:) One son should not be given and received, because he saves his foreborn (i.e. predeceased.) [That is, by performing their funeral rites, the Shrāddhs at Gaya, &c., he conveys his foreborn upwards (to heaven)].

"*Mitāksharā Vyavahārādhyāya*, leaf 54, side 1, line 3 :—'From the use, of poverty (it follows that) in prosperity (the son) should not be given.' This prohibition is the giver's (i.e. applies to him).

#### 4.—FITNESS FOR ADOPTION AS AFFECTED BY PERSONAL QUALITIES—SEX.

There is no instance in Hindû law of an adoption of a daughter to inherit. (a)

In the Dattaka Mīmāṃsā a section (VII.) is devoted to the attempt to establish the adoption of daughters as an institution of the Hindû law. Great learning and ingenuity were expended on this effort, but it has failed to gain acceptance for the proposed doctrine. (b) The Vyavahāra Mayūkha (c) rejects it, and no Śāstri has maintained it except as a possible variance justified by caste custom. As when one said—"An adoption by a woman of a daughter given by her mother may be recognized if conformable to the caste rules." (d) The only custom allowing it is that of the dissolute women whose imitations of adoption have already been considered. (e)

Meaning: Because it is said that in adverse time the son should be given, in the absence of adverse time (the son) should not be given. This prohibition applies to the giver. So the prohibition that one (only) son should not be given (also) applies to the giver alone.

"Mayūkha, p. 109, line 3:—'He who is married, and even he who has a child (or children), can become an adopted son.' Meaning: He who is married, or even he who has a son, (can) become an adopted son. (From this there seems to be no objection to a grown-up son being an adopted son.)

"Mayūkha, page 102, line 4:—'Let the mother or father give.' Meaning: Either the mother or father should give the son to be adopted.

"Mayūkha, page 105, line 8:—'A daughter's son and a sister's son should be given to a Śūdra only.' Meaning: A daughter's son and a sister's son should be given to a Śūdra."

(a) *Doe dem Henscover Bye et al v. Hanscover Bye et al*, East's Notes, Case 75. Daughters cannot be adopted, 2 Str. H. L. 217. See above, p. 1015, C. 2. 2, as to a quasi-adoption by a dancer.

(b) See above, pp. 873, 932.

(c) Chap. IV. Sec. V. para. 6.

(d) MS. 1681.

(e) Above, pp. 932, 933.

In *Hencower's* case (a) the pandit denied that the adoption of a daughter was consistent with the Hindû law. Yet in another case the adoption of a niece in order that she might become the mother of a putrikâ-putra was allowed. (b) The adoption, it was said, should be prior to marriage. This decision seems never to have been followed, and like Nanda Panditta's doctrine stands outside the living law. (c) The validity of any such adoption of a daughter must rest on a special custom.

The adoption of a sister, it was ruled, is illegal to the prejudice of legal heirs. (d)

A sister's daughter, or her son, cannot become a putrikâ-putra. (e) The institution is in fact no longer recognized, (f) though in the case quoted below it was only questioned by the Judicial Committee whether the old rule of Hindû law still exists, namely, whether a daughter may be specially appointed to raise a son, and the son of such daughter be preferred to more distant male relatives. If so, it was said, inasmuch as the rule breaks in upon general rules of succession whenever an heir claims to succeed by virtue of that rule, he must bring himself very clearly within it. (g)

#### 4. 1.—FITNESS FOR ADOPTION—AGE

The proper age of the son to be adopted is stated in widely different ways by different castes. (h) It is generally

(a) Above, p. 1052 (a).

(b) *Nawab Rai v. Buggawuttee Koowur*, 6 C. S. D. A. R. 5.

(c) 1 Macn. H. L. 102.

(d) *Toolooviya Shetty v. Coraga Shellaty*, M. S. D. A. R. 1848, p. 75. The adoption of a sister is wholly illegal; she could not have been begotten by the adoptive father without incest.

(e) *Nursing Narain v. Bhutton Lall*, Sp. No. C. W. R. 194.

(f) See above, pp. 886, 890, 894.

(g) *Thakoor Jibnath Singh v. The Court of Wards*, 23 C. W. R. 409. For the law as now received, see above, pp. 886, 890, 895, 932; 1 Macn. H. L. 102.

(h) Steele, L. C. 383. See above, p. 929.

agreed that the child ought to be young in order that he may become united by affection to his adoptive parents, (a) but this is rather a maxim of prudence than of law. Some castes fix the limit of age at five years; many at twenty-five; a few at fifty. The last indeed do not recognize a legal limit of mere age, though, with the others, they require that the adopted son should be younger than his adoptive father. (b)

The proper age for adoption is not uniform even for the same district in every caste. A boy may generally be adopted from the twelfth day after birth to his upanâyana, which is eight years for Brâhmans, eleven years for Kshatriyas, twelve for Vaiśyas. Śûdras may be adopted till the sixteenth year. (c) This is however simply the age of majority according to Hindû law. The statement must be taken as rather of what is recognized as right than of what is obligatory.

The native lawyers have written very elaborately on the subject of the boy's age as connected with his Samskâras. These views are considered below. (d) In the North-West Provinces it was ruled conformably to the Dattaka Mîmâmsa, that adoption in the Dattaka form ought to be within six years of age of the adoptee. (e) In Bombay on the other hand a person of whatever age is eligible for adoption. (f) Even—

(a) See above, p. 932.

(b) Steele, L. C. 182.

(c) *Ry. Sevagamy Nachiar v. Heraniah Gurbah*, 1 Mad. S. D. A. R. 101. See 1 Morl. Dig. p. 22, Notes 8 and 9. The authorities quoted in 2 Macn. H. L. 175, 178, give five years as the age within which a boy ought to be adopted. See Datt. Mim. Sec. IV. 32, 33, 43, and the Datt. Chand. Sec. II. 30, which gives eight years of age as the usual limit amongst Brâhmans.

(d) Sub.-sec. 4. 7.

(e) *Th. Oomrao Singh v. Th. Mahtab Koonwar*, 2 Agra Rep. p. 103.

(f) *R. Vyankatray v. Jayavantray*, 4 Bom. H. C. R. 191 A. C. J.; *Mhalsubai v. Vithoba Khandappa*, 7 Bom. H. C. R. App. xxvi.

"A man of 50 and having children, may be adopted if he has parents to give him away, but not otherwise." (a)

"A fatherless person of 30 years of age," it was said, "may be adopted with the consent of his mother or elder brother." (b)

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4. 2.—JUNIORITY OF ADOPTED SON TO ADOPTIVE FATHER.

It has been noticed that the son adopted must be junior to the adoptive father. On an extension of the same principle he should be junior to his adoptive mother, when she, as a widow, adopts him. (c) Thus the Śāstri says generally.

"The adopted should be junior to the adopter." (d)

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4. 3.—BIRTH DURING ADOPTIVE FATHER'S LIFE.

The imitation of nature is not carried so far as to disqualify a boy who, from the time of his birth, could not have been begotten by a deceased adoptive father. When authority to adopt is given to widow, she may adopt a boy not born at her husband's death. (e)

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4. 4.—IDENTITY OR DIFFERENCE OF FAMILY OR GOTRA.

This subject has been considered in the preceding Section. (f) When members of the lower castes are concerned, the term "gotra" is used in a second intention, but though this part of the subject is rather obscure it would probably

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(a) MS. 1755.

(b) MS. 1645. The competence of the elder brother to give in adoption is denied. See above, p. 930, and below, Sec. V.

(c) Above, p. 884; Steele, L. C. 182, 184.

(d) MS. 1673.

(e) East's Notes, Case 10; 2 Morl. Dig. p. 16.

(f) Above, p. 928 ss, and Sub-sec. 2. 2. of the present Section. In the *Mankars'* case, 2 Borr. at p. 95, the Śāstris say that a brother's or a daughter's son may be adopted without any ceremonies but an oral gift and acceptance.

be held that the same degree of propinquity which makes mere age a matter of indifference in the higher castes has the same effect amongst Śūdras. (a) Whether the absence of a true gotraship enables a Śūdra to adopt indiscriminately any son younger than himself is a point that still awaits determination. The opinions of the Sâstris would probably be opposed to such a license except on the ground of the Śūdras being below the operation of the religious family law, but no obstacle or preference probably would be recognized by the Courts as arising from consanguinity—none that is of an obligatory character. In case of difference of gotra the adoptee should be under five years of age; in case of identity the age of the adoptee is not restricted. (b)

(a) See Datt. Mim. II. 5, 80.

(b) Steele, L. C. 43. *Extract from the Dharmasindhu,—Who may or may not be adopted* (see 12 Bom. H. C. R. 373):—

Amongst Brāhmins the son of a uterine brother, because preferable, is to be taken first.

In his absence any Sagotra-Sapinda, or the son of a half-brother.

In the absence of such, an Asagotra-Sapinda, one produced in the family of the maternal uncle or in that of the father's sister, &c.

In the absence of such, an Asapinda of the same gotra.

In the absence of such, even an Asapinda of a different gotra.

Of the Asagotra-Sapindas the sister's son and the daughter's son are prohibited.\* \* \* But by a Śūdra even a sister's son and a daughter's son are receivable. \* \* \* The adopter having adopted should perform the ceremonies commencing with the jâtakarma or those commencing with the chûdâkarana for the boy adopted. This is the preferable doctrine; but if a boy for whom they can be so performed is not procurable, then from amongst the Sagotra-Sapindas, one whose upanayâna ceremony has been performed, or even whose marriage has taken place, may become an adopted son; but in the latter case, only if he has not produced a son. So it seems to me. If adoption is to be (=can be) made from amongst Asapinda-Sagotras only he whose upanayâna ceremony has been performed is to be (may be) taken. This appears also. As to a Bhiinna-gotra

Difference of gotra makes it important that the Samskâras should not have been performed in the family of birth. Identity of gotra makes this a matter of comparative indifference. (a) Hence the following opinions :—

“The person adopting may select whom he likes, without the assent of his relatives. If of a different gotra the boy should be adopted before tonsure.” (b) On the other hand—

“A man of 50, and having children, may be adopted if of the gotra of the adoptive father. The latter should invite his kinsmen, but their assent is not essential.” (c)

A married sagotra may be adopted by a widow in the Dekhan. A gift made by the widow, prior to the adoption, may be set aside by the adopted son, in this as in other cases. (d)

Some decisions recognize that limitation of age becomes material if the adoptee is taken from a line of strangers, (e) agreeing with the Sâstri, who says—

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(one of a different gotra), he whose upanâyana has not been performed is alone to be received. Some authors, however, say that a Bhinnagotra, whose upanâyana has been performed, may also be received.

(a) Above, p. 928.

(b) MS. 1683. Before upanâyana, 2 Str. H. L. 104.

Colebrooke says :—“ See Mitâksh. on Inh. Chap. I. Sec. XI. 13 ; A difference of opinion prevails in regard to adoption of adults, or persons for whom certain ceremonies termed Samskâra (marriage of Śūdras, and tonsure of the higher tribes) have been performed, the prevalent doctrine, in most parts of India, being adverse to it. The objections are less forcible in the instance of a relation of the male side, than in the case of a stranger.” 2. Str. H. L. 109.

(c) MS. 1634. See Sub-sec. 4. 9.

(d) *Nathaji v. Hari*, 8 Bom. H. C. R. 67 A. C. J., quoting—(1) *Raja Vyankatrâv Anandrâv Nimbâlkar v. Jayavantrâv bin Malhârâv Raṇadivé*, 4 Bom. H. C. R. A. C. J. 191 ; (2) *Rakhmâbâi v. Râkhâbâi*, 5 Bom. H. C. R. A. C. J. 181 ; (3) Steele, pp. 44, 182 ; (4) *Ranee Kishen v. Raj Oodwunt Singh et al.*, 3 C. S. D. A. R. 228 ; (5) *Bamundoss Mookerjea et al v. Musst. Tarinee*, 7 M. I. A. 169.

(e) *Verapermal Pillay v. Narrain Pillay*, 1 Str. R. 91.



"The adoption of a boy of eight years old, belonging to another gotra, and whose chaul and munj have been performed, is invalid," (a) but this rigour cannot probably be maintained in the present day. (b)

#### 4. 5.—BODILY QUALITIES.

The same qualities are required in an adopted son as in a son who is to inherit. Thus leprosy (c) or congenital blindness would disqualify, as making it impossible that the sufferer should discharge the ceremonial obligations of a son to his ancestors. (d)

#### 4. 6.—MENTAL QUALITIES.

Idiotcy or insanity disqualifying for inheritance disqualifies for adoption also, (e) and for the same reason. Cases are wanting, as in practice no one seeks to adopt a boy known to be disqualified. When the boy has reached a stage of intelligence his own assent must be obtained, which at an earlier stage may be replaced by that of his parents. (f) Sadriśam, (g) properly understood, includes a kindly feeling between the adoptive father and son, and a disposition to obedience on the part of the latter not amenable to strict legal rules. (h)

#### 4. 7.—RELIGIOUS AND CEREMONIAL QUALITIES.

Great differences of opinion are found amongst the authorities as to the precise stage of progress in the Samskāras or family sacra at which a boy becomes indissolubly united to

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(a) MS. 1629.

(b) See below, Sub-sec. 4. 7.

(c) A cripple. Steele, L. C. 184.

(d) See above, p. 575 ss.

(e) See above, p. 580 ss; Steele, L. C. 184.

(f) Above, p. 931; Datt. Mīm. Sec. IV. 47.

(g) Above, p. 928.

(h) Steele, L. C. 182.

his family of birth. (a) Some maintain that a severance may be made at any stage such as to fit the subject for initiation in another family. (b) The Dattaka Mīmāṃsa seems to allow adoption after tonsure to six years of age. (c) The Dattaka Chandrika gives eight years of age as the limit of age of a tonsured boy. (d) But both seem to allow a dissolution of the filial bond even after initiation by a repetition of the ceremony of initiation. (e) The Vyavahāra Mayūkha expressly allows the adoption of a married man, (f) though marriage is the limit set forth by other authorities as that at which adoption even of a Śūdra becomes impossible. It concurs with the Dattaka Chandrika in doubting the genuineness of a passage on which the limitation to five years of age is founded. Sutherland, in his Synopsis, gives it as "the most general and consistent rule that 'any person on whom the adopter may legally perform the upanāyana rite (g) is capable of being affiliated as a dattaka son.'" (h) Macnaghten states very decidedly that no adoption is possible after the upanāyana has united a boy to his family by a second birth. (i)

The Nirṇaya Sindhu, which is frequently followed by the Śāstris, calls that son *anitya datta*, who before adoption has proceeded in the Saṃskāras even so far as tonsure, but on this point the people have rather taken the Saṃskāra-kaustubha for their guide, which allows adoption after initiation, as the Vyavahāra Mayūkha allows it after marriage. (j)

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(a) As to these, see the Note Coleb. Dig. Bk. V. T. 134; Datt. Mīm. IV. 23; and Manu. II. 27—68.

(b) Above, p. 928 ss.

(c) Datt. Mīm. Sec. IV. 48—54.

(d) Datt. Chand. Sec. II. 30.

(e) Datt. Chand. Sec. II. 25—28; Datt. Mīm. Sec. IV. 51, 52.

(f) Vyav. May. Chap. IV. Sec. V. para. 19.

(g) Investiture with the sacred thread.

(h) Suth. Synops. Head II. *ad fin.* See Notes XI. and XII. to the same.

(i) 1 Macn. H. L. 73.

(j) See above, p. 896.

The authorities being so obscure and inconsistent the guidance afforded by custom and by the Śāstris becomes of peculiar importance. Here again however there are considerable differences, the caste rules being much more indulgent than the learned Brāhmins.

In the opinion of the Śāstri "the adopted boy should be under five years old, and his *chūḍa* (a) and other sacraments should be performed assigning him the adoptive father's gotra." (b) Some of the native authorities moreover and several decisions allow that the effect of tonsure as barring adoption (c) may be undone by an appropriate sacrifice even in the case of an only son. But on the other hand however much the age of adoptee may be above five years, his adoption will be valid if tonsure was not performed in the natural family. (d)

Connexion in gotra makes a new initiation unimportant, and thus the adoption of (1) a sagotra, (2) or of one descended directly from a common male ancestor, (3) or of a near relative of adopter on the paternal side is good, though he is

(a) Tonsure.

(b) MS. 1673. See above, p. 929.

(c) *Sy. Joymony Dossee v. Sy. Sibosoondry Dossee*, 1 Fult. 75, 28th March 1837; 1 Macn. H. L. 72 ss.; 1 Coleb. Dig. Bk. V. T. 182, 183, 273; Macn. Con. H. L. 141, 146, 192, 205; 1 Str. H. L. 91; 2 Str. H. L. 87, where the Śāstri gives the *upanāyana*, or marriage as the limit beyond which a transfer to another family becomes impossible. The caste laws do not in Bombay make tonsure a limitation, though they, in some cases, give this effect to investiture and marriage, Steele, L. C. 182. Even as to these the practice is lax. See Sub-sec. 4. 9.

(d) *Veerapermal Pillay v. Narain Pillay*, 1 Str. R. 91; *Musst. Dulabh Dai v. Manee Bibi*, 5 C. S. D.A.R. 50; see Datt. Chand. Sec. II. 20—33; Datt. Mim. Sec. IV. 22—54, and the notes to the preceding case. At 2 Str. H. L. 123 Ellis says that a boy adopted after tonsure becomes an *anitya datta*, whose son belongs to the original family of his father. Colebrooke says the son belongs to the family of his father's *munj* (investiture).

above five years in age and tonsure has been performed in his natural family. (a)

#### 4. 8.—INVESTITURE WITH THE SACRED THREAD.

A boy ought to be adopted before the performance of his munj, (b) or investiture with the sacred thread, (c) according to the law of some few castes. The others do not appear to make a point of this. In many of course there is no upanâyana ceremony; the fullest initiation of which a youth is capable is obtained by marriage, which in such castes takes the place to some extent of the investiture. (d) The restriction however must in either case be understood as subsisting only as between strangers by family and gotra. Amongst persons nearly connected there is no barrier raised to adoption by final dedication to the same family or gentile divinities. (e)

(a) *Tanjore Raja's case*, 1 Str. R. 126; *Veera-permal Pillay v. Narrain Pillay*, 1 Str. R. 91.

(b) See above, p. 928 ss; and 4. 8.

(c) Steele, L. C. 182, 383. For the proper ages of investiture see Datt. Chand. Sec. II. 31, Note.

(d) Datt. Chand. Sec. II. 29, 32; Coleb. Dig. Bk. V. T. 121 Comm.

(e) *Extract from the Samskarakautubha* (see 12 Bom. H. C. R. 374):—"One may be adopted as soon whether the Samskâras commencing with tonsure have taken place or not, and whether he has passed his fifth year or not. As to the doctrine 'one whose Samskâras have not taken place is alone to be adopted,' and 'who has not completed his fifth year is alone to be adopted,' founded upon the Kâlikâ Purânâ, that is wrong; because some say the passages are not genuine, as they are not to be found in many copies of the Kâlikâ Purânâ; and others say that, even if they be genuine, the first three shlokas have reference to Asagotra adoption; that, therefore, the last shloka also must be taken to have reference to the same subject; and that hence the rule does not apply to a Sagotra adoption; and they lay down that even a married (man) may be adopted. But the truth is, that even in the case of Asagotras a general prohibition (or non-recognition) of adoption after the Samskâras ending with the upanâyana have been per-

It has indeed been said that there is not in strictness any authority for the adoption of a boy whose munj or upanâyana has been performed. (a) And also that—

“A boy (Brāhman) cannot be adopted after his munj. The form of adoption gone through confers no right of heirship on him.” (b)

In other cases the Śāstris answered—

“A boy of a different gotra should not be married or have been invested with the thread.” (c)

“A boy adopted from another gotra should be taken before his thread investiture and marriage. In the same gotra this is not essential. In the former case the adopted acquires no rights of inheritance.” (d) A boy whose upanâyana had been performed would in Madras become but temporarily attached to the adoptive family. (e) In Bombay on the other hand

formed is not possible upon the strength of the Purāṇa passages, because the authority of the Vêdas to overrule contrary passages from the Smṛitis (and Purāṇas) is well established by the rule of commentators to determine the relative authority of texts, and the above passages of the Purāṇa are in opposition to the Bahvrîcha Brāhmana. Thus it is indisputable that the expression ‘the son given and the rest’ includes ‘the son made and the rest.’ Hence it follows that one on whom the Samskâras have been performed in his natural family cannot become a self-given son either. But in the Brāhmana it is plainly stated that Shunashêpa himself became the son of Vishvâmitra, and it is not to be supposed his upanâyana had not been performed in his natural family.”

(a) *P. Venkatesaiya v. M. Venkata Chârlu et al*, 3 Mad. H. C. R. 28.

(b) MS. 1751. See above, pp. 898, 899.

(c) MS. 1616. The question was as to son of father's brother's daughter's son, who would be unfit for adoption on account of his mother's consanguinity with the adoptive father according to the stricter rules as to the prohibited degrees. See above, p. 937.

(d) MS. 1615.

(e) *P. Venkatesaiya v. M. Venkata Chârlu*, 3 Mad. H. C. R. 28; 1 Str. H. L. 88, 89, 90. The anitya datta, whose son returns to the family of the father's original gotra is nowhere recognized by the Bombay Śāstris, see above, p. 899.

the adoption by a Brāhman of a boy of a different gotra, whose munj had been performed, was pronounced quite legal and effectual; (a) and a similar answer was grounded on an instance of such an adoption said to be given in the Vêda. (b)

In *Lakshmappa v. Ramava* (c) it is laid down by Nana-bhai Haridās, J., consistently with the replies just quoted, that the performance of the chudākaraṇa (d) and the upanâyana (e) in the family of his birth does not disqualify even a Brāhman for adoption, as the effect of these ceremonies may be annulled.

In Bengal the adoption of a boy, eight years old, was held to prevail over a daughter's claim to inheritance, the boy not having been initiated in the natural father's family. (f) But a contrary rule would prevail where even the chûḍa had been performed.

The father of a boy after agreeing to give him in adoption performed his tonsure under his own family name. Afterwards the adoption was carried out and the *homa* performed. The Paṇḍit pronounced such an adoption invalid. (g)

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#### 4. 9.—FITNESS FOR ADOPTION—AS AFFECTED BY MARRIAGE.

Strange (h) gives marriage in the fourth class as a ceremony after which adoption becomes impossible. This is

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(a) MS. 1719.

(b) MS. 1717. The reference is to the story of Śanahśepa (above, p. 896) on which the Saṃskāra-kaustubha founds the doctrine here followed by the Śāstri.

(c) 12 Bom. H. C. R. at p. 370.

(d) Tonsure.

(e) Investiture.

(f) *Keerut Nuraen v. Musst. Bhobinsree*, 1 C. S. D. A. R. 161; *Sreenassien v. Sashyummal*, M. S. D. A. Dec. 1859, p. 118; see 1 Str. H. L. 89, 90.

(g) 2 Macn. H. L. 181.

(h) 1 Str. H. L. 91.

confirmed by a Madras Śāstri, (a) and the same appears to have been the opinion of Jagannātha. (b)

"The Poona Śāstris do not however recognize the necessity that adoption should precede munj and marriage. The passage so interpreting the law is said by the author of the Mayūkha to be an interpolation." (c) It is only the question of marriage that could be raised in the majority of cases, as for Śūdras there is no other (initiatory) ceremony but marriage. (d) Thus it was answered:—

"The son of a sister-in-law may be adopted by a Brāhman. But a married man of the same gotra only can be adopted." (e)

This condition being satisfied the adoption of a married man is admissible, though of the mature age of 45 years, and though he has a family, and his natural father prohibited adoption. (f)

(a) 2 Str. H. L. 87.

(b) Coleb. Dig. Bk. V. T. 183, 273 Comm. "The investiture and other ceremonies . . . concern men of the twice-born classes: marriage is the only sacrament for a man of the servile class." Coleb. Dig. Bk. V. T. 121 Comm. "A man of the servile class universally obtains marriage as his only sacrament (Samskāra)" Ib. T. 122.

(c) Steele, L. C. 44. See above, p. 929.

(d) *Sy. Joymony Dossee v. Sy. Sibosoondry Dossee*, 1 Fult. 75.

(e) MSS. 1642, 1643.

(f) *Sree Brijbhokunjee Maharaj v. Sree Gokulotsajee Maharaj*, 1 Borr. 181, 202 (2nd Edn.); *Lakshmappa v. Ramava et al*, 12 Bom. H. C. R. 364; Vyav. May. Chap. IV. Sec. V. 19. The Śāstris in reply to a question put to them said:—In the commencement of the Shastr it is written, A woman who has lost her husband must obtain the sanction of her father previous to adopting a son, and if she have no father then that of the caste. Again it is written, that a woman who has reached years of discretion may of herself perform religious duties. So she may adopt a son without permission, if none of the caste are at the time to be found. It is also stated that a boy under five years of age should be adopted in order that he may be brought up in

The more recent decisions also say that the adoption of a married boy is admissible, if he is a sagotra, though he has children, amongst Śūdras. (a) And generally it may be said that by the law of Bombay the adoption of a married Śūdra is not invalid, (b) as in *Lakshmappa v. Ramava*, (c) it is ruled that a married sagotra may be adopted, sagotra meaning one in a relation of natural propinquity.

Whether upanâyana and marriage in the natural family are a bar to adoption in another family among Brāhmins, was a question raised in the case referred to below. (d) The Court refused to consider it, holding the defendant bound by estoppel from disputing the adoption as he had taken part in the ceremony. Elsewhere than in the Bombay Presidency a married man does not seem to be eligible for adoption, even amongst the lower castes. Thus in Bengal the adoption of a Śūdra, if otherwise eligible, is permissible at any age prior to marriage, (e) not after it.

the religious tenets of his adoptive father. This relates to cases where no relationship subsists, but when a relation is to be adopted, no obstacle exists on account of his being of mature age, married, and having a family, provided he possess common ability, and is beloved by the person who adopts him. However, if the father of the person to be adopted be seriously averse to it, declaring that his son shall not be given in adoption, the ceremony cannot be performed, since the Shastr ordains that the free consent of the father is necessary to the adoption of his son by another person.

(a) *Nathaji v. Hari*, 8 Bom. H. C. R. 67 A. C. J.; *Lakshmappa v. Ramava*, Bom. H. C. J. F. for 1875, p. 394; Vyav. May. Chap. IV. Sec. V. 19.

(b) *Lakshmappa v. Ramava*, Bom. H. C. J. F. for 1875, p. 394; *Mhalsabai v. Vithoba Khandappa*, 7 Bom. H. C. R. Appx. xxvi.

(c) 12 Bom. H. C. R. at pp. 372, 373.

(d) *Sadāshiv Moreshwar v. Hari Moreshwar*, 11 Bom. H. C. R. 190.

(e) *Ry. Nitradaye v. Bholanath Doss*, Beng. S. D. A. R. 1853, p. 553.



In Madras too the adoption of a married boy is illegal. (a) It is illegal though the adopted is a Śūdra (28 years old.) (b)

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#### 4. 11.—FITNESS FOR ADOPTION—PLACE IN CASTE OF THE ADOPTED SON.

According to the customary law of the Dekhan exclusion from caste annuls an adoption. (c) It must *à fortiori* prevent it, as no benefit, or at least not the benefit chiefly regarded, can be had from an outcaste son.

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#### 5.—FITNESS FOR ADOPTION—IN CASE OF ANOMALOUS ADOPTIONS.

In the case of an adoption anomalous, as made by a mother instead of a widow, if such an adoption can be allowed, no variance, so far as is known, arises in the choice of the boy to be adopted. The *dvyāmushyâyana* has been considered under the head of an "Only son" and of "Relation through the natural father." (d) As the connexion of a *dvyāmushyâyana* with his own family is not severed there is no fulness of the filial relation between him and his quasi-adoptive father; consequently the restrictions arising from ideal physical relations between the adoptive parents and the real ones do not apply to this case. In practice, however, the adoption of a sister's or a daughter's son as a *dvyāmushyâyana* is not known to occur. Where the adoption is allowed at all it is allowed in the fullest sense. (e)

We have above seen one instance (f) in which a reminiscence of the ancient institution of the *putrikâ putra* seems

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(a) *Ry. Sevagamy Nachiar v. Heraniah Gurbah*, 1 M. S. D. A. B. 101.

(b) *Virakumara Serrai v. Gopalu Serrai*, M. S. D. A. R. 1861, p. 147.

(c) Steele, L. C. 185; comp. above, pp. 944, 946.

(d) See pp. 897 ss, 1023, 1040.

(e) Above, p. 887.

(f) p. 1030.

to have been preserved in practice though opposed to the law of to-day. (a) In such a case should the practice be authorized by caste custom, there can be no room for choice of the son. (b)

According to usage in Malabar, adoption is necessary among the Chetty caste, to constitute the sons of daughters lawful heirs on failure of sons. (c)

#### 6.—FITNESS FOR ADOPTION—IN CASE OF QUASI-ADOPTIONS.

As the *kritrima* form of adoption (d) is not recognized in Bombay no extended notice of it is called for in the present connexion. No restriction seems to be placed on the choice of the son (e) adopted by a man or a woman. He must expressly consent to the adoption, and he contracts no family relation with the cognates of the adoptive father or mother. (f) This is adoption with all the original significance taken out of it, as in the last stages of the Roman law, or rather perhaps an inartistic inclusion within the law of adoption of an aboriginal local custom which could not be moulded exactly to the Brāhminical scheme. (g)

(a) Above, pp. 877, 886.

(b) The *putrikā putra* who in some lists (Yājñavalkya, Devala) stands second, has no place in Mauu's list. This some explain by saying that he stands on exactly the same footing as an *aurasa*. By a laxity of expression the daughter herself might be called *putrikā putra*, and being appointed by her father might perform his obsequies. Suth. in 2 Str. H. L. 199. See above, pp. 877, 885, 888, 894.

(c) 1 Mad. S. D. A. R. 157.

(d) See above, p. 894.

(e) *Ooman Dutt v. Kunhia Singh*, 3 C. S. D. A. R. 144, is discredited by the observations in *Srimati Uma Deyi's* case, L. R. 5 I. A. at pp. 51, 52.

(f) 1 Macn. H. L. 75, 76. Hence the adoption of an only son generally disallowed is lawful where the *kritrima* adoption is recognized. *Musst. Tikdey v. Lalla Hurylal*, C. W. R. Sp. No. p. 133.

(g) See above, pp. 155, 869, 879 Note (e), 888.

In the natural adoptions in use amongst the tribes in Gujarâth (a) which from the orthodox Hindû stand-point must be regarded as mere quasi-adoptions, no restriction is known to exist on the choice of the boy. Nor is it known that a girl is recognized as a fit subject for adoption. (b) The son of a near relative, male or female, is taken as the foster son (pâlak putra) with such doubtful rights as have already been described.

The adoption of her own brother's daughter by a widow, governed by the Mitâksharâ, can be regarded only as an adoption in the popular not in the legal sense. (c)

A man cannot be adopted into a family governed by Alya Santâna law. (d)

"Adoption amongst Kalavântins is to be governed entirely by the custom of the class. The Śâstra gives no rules." (e) So far as an adoption can be recognized at all it seems to be a matter of the freest choice, as in the following case:—

A dancing woman brought up a son of her servant as her own. On her death his daughter was put into her place to draw the temple allowance. The Śâstri declared the foster son heir by caste custom, not his daughter. (f)

(a) Above, p. 925.

(b) A foster-daughter is mentioned above, p. 454 Q. 1; but she is not recognized as a subject of any right of inheritance. The Gujarâth castes who admit a foster-son do not allow him to be replaced by a daughter.

(c) *Musst. Thakoor Dayhee v. Rai Balack Ram*, 10 C. W. R. 3 P. C. See above, p. 933.

(d) *Munda Chetty v. Timmaju Hensu*, 1 Mad. H. C. R. 381 Note.

(e) The case was one of a sister's son's son adopted by a Kalavântin. MS. 1651. As to the pâlak kanya of a dancer, see above, pp. 925, 1015.

(f) MS. 1707.

## SECTION V.

## THE CAPACITY TO GIVE IN ADOPTION AND THE CIRCUMSTANCES UNDER WHICH IT MAY BE EXERCISED.

## THE CAPACITY LIMITED TO THE PARENTS.

It is plain that from the religious point of view the gift of a son in adoption ought not to be made without the concurrence of both his natural parents. (a) Besides his first duty to his father, the son owes ceremonial services to his mother and her father. (b) Even a step-mother shares the benefit of his sacrifices. In the sphere of positive law the natural connexion between the mother and her son has not been able to contend against the authority of the husband and father. The sources of the Hindû law give, in some places, a rather uncertain sound, but the general result is that the mother has no real control over a proposed gift by her husband, and can herself act alone in giving away a son during her husband's life only on a real or assumed permission from him. This will be evident from the following examination of the authorities.

It will be seen too that the capacity of the widow to give in adoption without an authority from her husband is more generally recognized than her capacity to take in adoption, though even in giving she has not an unlimited right. The principal text is in *Vasishtha*, but with slight variances it is found in other *Smritis*.

“The father and mother may give, sell, or abandon their son. But an only son is not to be given or received, as he must continue the line of his ancestors. And a woman shall

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(a) Above, p. 910. *Datt. Mīm. Sec. IV. 14, 15.*

(b) The subordinate character of the *Śrāddhas* celebrated for a mother and her ancestors may be seen from the discussion. *Datt. Chand. I. 24.* See also *Datt. Mīm. II. 72, Note.*

neither give nor receive a son except with her husband's permission."—Vasishṭha XV., 2—5. (a)

The Dattaka Mīmāṃsa says:—"The capacity to give consists in having a plurality of sons, and the assent of the wife" and so forth. (b) But the most perfect gift, from the religious point of view, must here have been intended, not one legally sufficient. At another place in the same work (c) it is laid down that "the husband singly even, and independent of his wife, is competent to give a son, for in the two passages cited (d) the father is mentioned singly and unassociated with the mother." The reason rests in part on a grammatical subtlety which it is hard to appreciate, both father and mother being mentioned apparently without any intention to assign a superiority to either; (e) but reliance is placed also on the greater part of a father in his son, (f) and on the generally subordinate place of the wife. Whatever may be thought of the reasoning the conclusion is perfectly clear. The Dattaka Mīmāṃsa however allows the gift as it allows the acceptance of a son by a wife under a delegation from her husband still living. (g) When he is dead his authority or assent can no longer be had, and an adoption is impossible, but the widow may give away her son under the authority

(a) Amongst the Saxons the right of a father to sell his children was recognized, and it continued for some time after they had embraced Christianity.—Kemble's Saxons in England, vol. I. p. 1.

The passages in the Smṛitis coupling gift with sale and limiting both to a time of distress point back to a stage at which the doctrine of adoption had not been developed to anything like the extent which now makes it so important. See above, p. 876; Coleb. Dig. Bk. II. Ch. IV. T. 7.

(b) Sec. V. 14.

(c) Sec. IV. 13.

(d) i.e. Manu IX. 168; Yājñavalkya II. 130.

(e) Vasishṭha *does* subordinate the mother as shown above.

(f) Above, p. 885.

(g) Datt. Mīm. Sec. I. 16, 17, 18.

of the Smṛiti, which says: "The father or the mother (both) may give." (a) While the husband is alive she must not give without his assent; when he is dead she may use her discretion in the exigencies which would warrant a gift by the father.

The Dattaka Chandrika, after quoting Manu and Atri to the effect that a man destitute of male offspring may adopt a son, (b) cites the familiar text of Vasishṭha, "Let not a woman either give or receive a son in adoption unless with the assent of her husband." (c) Hence he gathers that with this assent a woman may adopt. The case of adoption by a widow is not specifically dealt with, but a woman may give in adoption "with her husband's sanction if he be alive, or even without it if he be dead, or have emigrated or entered a religious order." (d) The author construes the passage of Yājñavalkya in its natural sense as giving authority to father and mother alike, (e) a construction which obviously involves the competence of a widow to adopt also without special authority for the purpose from her deceased husband.

The Mitāksharā limits the mother's authority to give thus:— (f)

"He who is given by his mother with her husband's consent, while her husband is absent or after her husband's decease, or who is given by his father, or by both, being of the same class with the person to whom he is given, becomes his given son (dattaka). So Manu declares." Balambhat's commentary adds "incapable" to "absent," and "without his assent" to "decease," conformably to a general tendency to favour females found in this author. If the mother is

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(a) Datt. Mim. Sec. IV. 10, 11, 12.

(b) Sec. I. 3.

(c) Sec. I. 7.

(d) Sec. I. 31.

(e) Sec. I. 32.

(f) Mit. Chap. I. Sec. XI. para. 9.

present her assent is deemed as necessary it would seem as the father's. (a) Caste custom, however, though it recognizes the mother's assent as desirable, does not regard it as indispensable. (b)

The Vyavahâra Mayûkha, (c) referring to Manu, says that where both parents are alive the gift ought to be made by both, if the father be dead by the mother, if the mother be even absent by the father. The ceremonial prescribed in the same work (d) presupposes that the giver and receiver are both males. Vasishṭha however is quoted as authorizing a woman's gift or acceptance of a son with the assent of her husband, (e) and the necessity of assent being limited by inference to the woman under coverture, it is said that the widow's authority is unrestricted. (f) The author had the taking of a boy in adoption more immediately in view, (g) but his argument applies with at least equal force to giving.

The Vîramitrodaya (h) says the mother may give with her husband's assent, the father on his own authority. It relies, like the other treatises, on Vasishṭha, and maintains, contrary to the Dattaka Mîmâṃsa and other works, not only that the assent of a living husband is unnecessary, but that no assent at all is necessary for a widow adopting. As to the giving of a son the Vîramitrodaya is not explicit, and the reason given for allowing an adoption without the husband's assent, that otherwise his spiritual interest may suffer, does not apply to the gift of a son. When however there is no

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(a) See Colebrooke's Note, *ad loc.*

(b) Steele, L. C. 183.

(c) Chap. IV. Sec. V. para. 1.

(d) Para. 8, 37 ss.

(e) Para. 16.

(f) Para. 18.

(g) See para. 36.

(h) Transl. p. 115.

danger to these the widow's authority to give seems to be placed on the same level as her power to take: it is subject only in case of her dependence to the approval of the near relatives.

Questions relating to the capacity to give in adoption have naturally been far less frequent than those relating to the power to adopt. By a gift in adoption no one in the family of the child given loses any thing, while the introduction of a child often takes away a succession or an estate from him who holds or expects it. The following responses show that a gift by the parents is essential to adoption but without drawing any distinction amongst the several cases of gift by the husband, the wife, and the widow.

"A boy cannot be given in adoption by any one except his parents." (a)

"The father or mother should give a boy in adoption." (b)

The decisions of the Courts are to the same effect. No one but the natural father or mother can give in adoption. (c) The grandfather for instance, (d) or the brother, has not the requisite authority. (e)

An orphan cannot be adopted because there are no parents to make the requisite ceremonial gift. (f) This principle excludes the *svyamdatta* or self-given. (g)

(a) MS. 1643.

(b) MS. 1675.

(c) *Lakshmappa v. Ramana*, 12 Bom. H. C. R. at p. 376, and cases there quoted.

(d) *The Collector of Surat v. Dhirsingji Vaghbaji*, 10 Bom. H. C. R. 235.

(e) *Basheltiappa v. Shivalingappa*, 10 Bom. H. C. R. at pp. 271, 272.

(f) *Balvantrao v. Bayabai*, 6 Bom. H. C. R. 83 O. C. J.; *Basheltiappa v. Shivalingappa*, 10 Bom. H. C. R. 268.

(g) *So Veerapermal v. Narain Pillay*, 2 Mad. H. C. R. 129; and *Muttusamy Naidu v. Lutchmeedevumma*, M. S. D. A. R. Dec. 1852, p. 96.



## CAPACITY TO GIVE IN ADOPTION.

## A.—GIFT BY THE FATHER.

## A. 1.—FATHER'S PERSONAL COMPETENCE.

A leper, according to a Bengal case, can give his son in adoption (*a*) unless perhaps he has the disease in a severe and disabling form. Leprosy, as it disqualifies for the performance of religious acts, (*b*) might, on that account, be held amongst the higher castes to prevent the gift by a father afflicted with it. The son in fact takes the place of a father thus disqualified in a Hindû family. In Bombay the gift, if made at all, would probably be made by the wife with the assent of relations. (*c*)

## A. 2.—CIRCUMSTANCES IN WHICH THE GIFT MAY BE MADE.

The Dattaka Mīmāṃsa quotes Manu and Kātyāyana to prove that a gift of a son may be made only in a season of distress. (*d*) In famine a son may be given or even sold, and the stress of necessity justifies a widow in thus parting with her son. (*e*) The author gives a strained interpretation to the passage by making it refer to the distress of him who has no son, (*f*) but he cannot but accept the natural sense. (*g*) The Mitāksharâ says the condition relates to the giver not to the taker. (*h*) The Vyavahâra Mayûkha (*i*)

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(*a*) *Anund Mohun v. Gobind Chunder*, W. R. 1864, p. 173.

(*b*) See above, pp. 576, 579, 585; Viram. Transl. 256; Vyav. May. Chap. IV. Sec. XI. para. 10; Dâya Bhâga Chap. IV. paras. 4, 18; Mit. Chap. II. Sec. X. para. 10.

(*c*) See Steele, L. C. 182; Mit. Chap. I. Sec. XI. para. 9 Note.

(*d*) Sec. I. 7. The original passage of Manu. (IX. 163) is quoted. I. L. R. 2 Bom. at p. 380; Kātyāyana at Coleb. Dig. Bk. II. Chap. IV. TT. 6, 7.

(*e*) Sec. IV. 12.

(*f*) Datt. Mīm, Sec. IV. 21.

(*g*) Datt. Mīm. Sec. I. 8; Sec. IV. 18, 19.

(*h*) Chap. I. Sec. XI. para. 10.

(*i*) Chap. IV. Sec V. para. 2. See above, p. 1016.

finds fault with this doctrine of Vijñaneśvara and contends that where the gift has not been justified by need, the desired religious state has not been induced by the form of adoption. This seems a rather cavilling objection; it is, at any rate, not one of any practical importance in the law. A gift made by a competent parent is universally admitted to be effectual, whether made under the pressure of want or not. Very few adoptions are made from pauper families, and the gifts or sales made during famine are not usually attended with any ceremonies of adoption.

A Śāstri says—"Parents in indigent circumstances may give a son in adoption" (a) but no instance occurs of a gift pronounced invalid through want of a poverty qualification.

### A. 3.—QUALIFICATIONS OF THE POWER.

The free consent of the mother is said to be necessary if she is living with her husband, (b) but "desirable" would be the proper word (c) save in a quite exceptional instance. The restrictions arising from the condition of the boy as an only son or an eldest son have been discussed in the previous Section. The only substantial qualification of the parents' power arises in the case of a boy sufficiently old to have intelligence and a will of his own. The assent of such a boy (or man) is necessary. (d) Without it the desired adaptation of character (e) is not in such a case to be hoped for, and the son is not a mere chattel. (f) His assent may be safely inferred from his going through the ceremonies.

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(a) MS. 1683, but the condition is a purely moral one, and one that is very lightly regarded.

(b) Steele, L. C. 45.

(c) Steele, L. C. 183, 385.

(d) Steele, L. C. 385.

(e) Above, p. 928.

(f) See above, pp. 930—932; Vayv. May. Chap. IV. Sec. I. para. 11; Chap. IX. para. 2. The limitation of the right of disposal over children to the parents originated no doubt in religious feeling, but it has pro-

Relatives should be informed of an intended gift in adoption, but their consent and the consent of the caste are desirable rather than necessary. It is most nearly essential, where, owing to the refusal of near relatives to give a son, it becomes necessary to have recourse to distant connexions or to strangers. (a)

The Poona castes seem to have thought, when questioned by Mr. Steele, that the consent of the Government was necessary in the case of Sarinjâmdârs and the like, not only to an adoption, but to the particular choice made in each instance. (b)

#### B.—GIFT BY THE MOTHER.

##### B. 1.—AS A WIFE—BY EXPRESS PERMISSION OF THE HUSBAND.

The Dattaka Kaustubha prohibits the giving equally with the receiving of a son in adoption by a wife without her husband's permission. (c)

The express permission of her husband is necessary to validate a gift in adoption by a wife of their son, though the Smṛiti Chandrika is not to be construed as placing adoption and giving in adoption by a wife on the same level. (d)

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bably been maintained in a measure at least by a sense of its being a necessary safeguard for the children. Their interests were least likely to be sacrificed by their parents. The removal of the child from the class of mere chattels is important with respect to the illegality of giving in adoption subject to terms injurious to the child as a son in the family of adoption. Such terms the Śāstris have in some instances pronounced void, as will be seen in the next Section.

(a) Steele, L. C. 183.

(b) Steele, L. C. 182.

(c) Leaf 44, p. 1, l. 6 (Bom. Shaké 1783).

(d) *Narayan v. Nana*, 7 Bom. H. C. R. 153, 162, 167, 172; *Laksh-mappa v. Ramava*, 12 Bom. H. C. R. at pp. 386, 397.

## B. 1. 2.—WITH IMPLIED ASSENT OF THE HUSBAND.

An express permission does not seem absolutely necessary. The law was stated thus. A wife is not competent to give her son in adoption against the will of her husband, expressed or implied, or gathered from the circumstances of the case. (a)

It was held also that where the natural father permitted the adoption of his boy under certain conditions, one of which was imposed in consequence of a mistake as to the necessity of an assent of Government to an adoption, non-fulfilment of the condition rendered the adoption invalid. (b)

When the father is insane and unable to give his consent, the mother alone can give her son in adoption. (c)

## B. 2 —GIFT BY THE MOTHER—AS A WIDOW.

Jagannātha says, a gift by the mother alone is void ; by the father alone valid, though religiously defective. (d) After the death of one of the parents he regards the father's power as complete, but the mother's as dependent on authority given by her husband, (e) which will also validate a gift by a wife. (f) He is thus less liberal to the widow than the authorities quoted in the beginning of this Section. It would seem that the true view is that of a joint interest in the son with a discretionary power of acting in the widow after her husband's death, except in cases plainly injurious to his spiritual welfare or opposed to his known wishes.

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(a) *Rangubai v. Bhagirthibai*, 1. L. R. 2 Bom. 377; *Lakshmappa v. Ramava*, 12 Bom. H. C. R. at p. 397.

(b) 1. L. R. 2 Bom. at p. 383.

(c) *Hurosoondree Dossee v. Chundermoney Dossee*, Sev. R. 938. See above, Sub-sec. A. 1.

(d) Coleb. Dig. Bk. V. T. 273, 274 Com.

(e) *Ib.* T. 275, Comm.

(f) *Ibid.*

The Nirṇaya Sindhu, (a) quoting from Vatsa and Vyāsa “The son given by the father or the mother is a given son” (datṛima), maintains that the restrictions on the mother’s capacity, either to give or to take, endure only while the father lives. The Smṛiti is obviously a much more direct authority for freedom in giving than in taking. “The Hindū law clearly points to the mother as the person who can give in adoption when the natural father is dead.” (b)

The narrower view of the widow’s capacity is illustrated by the following two cases, both in Bengal, where generally the widow’s rights are most restricted.

Though the natural father consented to the adoption of his boy, he not having lived to make the gift, the adoption, it was held, could not be made. (c) A mother indeed, it was said, cannot give her only son in adoption even as a dvyā-muṣhyāyana without authority previously obtained from her deceased husband. (d)

In a later Bengal case, however, it was said that the assent of the father to the gift of a son might be presumed where no dissent had been expressed, on the authority of the Datt. Chandrika, (e) though this did not extend to the taking of a son in adoption. (f)

The principle of the widow’s dependence has been brought to bear in Madras as a means of controlling her right to give in adoption. It was ruled that in the absence of con-

(a) Bom. Edn. Shaké 1784 ; Parichheda III. fol. 9, 1, ll. 3, 4.

(b) *The Collector of Surat v. Dhirsingji Vaghbaji*, 10 Bom. H. C. R. at p. 237.

(c) *Gourbullah v. Jugernatpersaud Mitter*, Macn. Con. H. L. 217.

(d) *Debee Dial et al v. Hurhor Singh*, 4 C. S. D. A. R. 320. His being the only son was material.

(e) Sec. I. paras. 31, 32.

(f) *Tarint Charan v. Suroda Sundari Dasi*, 3 B. L. R. 145 A. C. J.; S. C. 11 C. W. R. 468.

sent from her deceased husband, but with the consent of his father, brother, &c., a mother may give her younger son in adoption. (a)

In Bombay on the other hand a Śāstri said that "when either of the parents has given a son by pouring water on the hands the gift is complete. The parents need not consult their relatives." (b) The gift in the particular case however had been made by the father, and the Śāstri did not probably contemplate the case of a gift by the mother without the consent of the father. Where a father has indicated that he does not wish his son to be given in adoption, his widow has not authority to make the gift. In any case in which he may probably have desired the retention of the son the gift is invalid if made without an express authority from him. Such authority is specially necessary where the gift will leave the deceased father spiritually destitute. (c)

Even amongst the Lingâyats, though they are Śāstras, (d) permission will not be presumed for a widow to give away an only son or an eldest son in adoption. (e) Where a mother, however, in pursuance of the promise of her deceased husband, allowed her son to be adopted, but did not herself (being ill), attend at the adoption ceremonies to give him in adoption, but commissioned her uncle to give the boy on her behalf, it was held that the adoption was not on that account invalid. (f)

In one case at Madras it was held that the consent of a brother, as representing his deceased father, to the adoption

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(a) *Arnachellum Pillay v. Jyasamy Pillay*, 1 Mad. S. D. A. R. 154; Coleb. Dig. Bk. V. TT. 273—275.

(b) MS. 1677.

(c) *Somasekhara Rāja v. Subhadramāji*, I. L. R. 6 Bom. 524.

(d) *Gopal v. Hanmant*, I. L. R. 3 Bom. 373.

(e) *Lakshmappa v. Ramava*, 12 Bom. H. C. R. 364; *Somasekhara v. Subhadramāji*, I. L. R. 6 Bom. 524.

(f) *Vijidrangam v. Lakshuman*, 8 Bom. H. C. R. O. C. J. 244; see 2 Str. H. L. 94 as to the delegation of ceremonial functions.

of his brother was sufficient. The mother not attending, her consent was presumed. (a) But this ruling has not been approved. It is inconsistent with several subsequent cases, (b) and though not entirely unsupported by native authority (c) cannot be considered good law.

The concurrence of an eldest son may properly be required to the gift in adoption of a younger son by the widow. (d) She is legally and religiously dependent on him as head of the family, and this authority may well be recognized where it can be exercised only in restraint of a parting with a brother. (e)

### C.—GIFT BY PERSONS INCOMPETENT.

#### C. 1.—BY ADOPTIVE PARENTS.

The texts do not warrant a gift by adoptive parents. (f) The prescribed ceremonies imply a gift by the boy's real father to another taking him as his son. (g)

#### C. 2.—PERSONS COMMISSIONED BY THE PARENTS.

The parents cannot delegate to any other person the authority to give in adoption after their decease. (h)

(a) *Veerapermal Pillay v. Narrain Pillay*; 1 Str. R. 91; see M. cn. Cons. H. L. p. 220; Steele, L. C. 48, Note.

(b) See *Bashettiappa's* case, 10 Bom. H. C. R. at p. 272. Below, Sub-sec. C. 3.

(c) See above, p. 910.

(d) Steele, L. C. 48.

(e) "A gift made by a dependent person without the consent of the principal owner (i. e. the 'head' or 'lord') is void." Coleb. Dig. Bk. V. T. 273, Comm.

(f) Above, p. 896; see 2 Str. H. L. 142. The Roman law specially guarded against an adoptive father giving away his adopted son without good cause, while it allowed the son injured by adoption to claim emancipation on reaching his majority. Inst. Bk. I. T. XI. § 3, and Ortolan *ad. loc.*

(g) See 2 Str. H. L. 218; Datt. Chand. Sec. II. 16; Datt. Mīm. V. 13; Vyav. May. Chap. IV. Sec. V. para. 8.

(h) *Bashettiappa v. Shivalingappa*, 10 Bom. H. C. R. 268.

## C. 3.—BY GRANDFATHER, BROTHER, &amp;c.

When the father is dead, and the mother living, the grandfather cannot give away a boy in adoption. (a)

The adoption of a boy, delivered by his brother, but not by either of the parents, and in which the adoptive mother did not obtain her husband's consent, was not upheld by the Court. (b)

One brother cannot give another in adoption on account of their equality in position, (c) more especially when the parents are dead; and even though the father had previously consented to such an adoption. (d)

## C. 4.—SELF-GIFT.

"The only son of one deceased cannot give himself in adoption." (e)

"The svyamdatta," or son self-given, is not to be recognized in the Kali yug." (f)

The kritrima or karta putra in the Maithila district is an exception. But this mode of adoption, as already noticed, is not allowed elsewhere.

(a) *Collector of Surat v. Dhirsungji Waghbâji*, 10 Bom. H. C. R. 235.

(b) *Musst. Tara Muneé Dîbea v. Deb Narain et al*, 3 C. S. D. A. R. 387; Coleb. Dig. Bk. V. T. 275. Amongst some tribes in the Panjâb a man may give his brother in adoption, but not his only son. Amongst some he may not give his eldest son. In some tribes he may give his only son to a brother or near relative. See Tupper, *Panj. Cust. Law*, vol. II. p. 155.

(c) *Muttusawmy Naidu v. Lutchmeedevamma*, M. S. D. A. Dec. 1852, p. 96.

(d) *Bashettiappa v. Shivlingappa*, 10 Bom. H. C. R. 268.

(e) MS. 1746. *Bashettiappa v. Shivalingappa*, 10 Bom. H. C. R. 268; *Lakshmappa v. Râmarâi*, 12 Bom. H. C. R. at p. 390.

(f) MS. 1755. See above, p. 895.



## SECTION VI.

## A.—THE ACT OF ADOPTION (a)—ITS CHARACTER AND ESSENTIALS.

Adoption amongst the Aryan Hindûs, as it was amongst the Greeks and Romans, is essentially a religious act. (b) Its purpose and the ideas connected with it have been discussed in Section II. It follows almost necessarily from the view of the subject taken by the Brâhmins and by those classes who have inherited or adopted Brâhminical institutions that the sacrifices and invocations by which a boy is transferred from association with one line of manes to another should be deemed indispensable to a true adoption. (c) And as the rights of property are under the Brâhminical system indissolubly connected with spiritual union (d) the succession to a member's place in the united family, or to the aggregate of rights and duties centered in him alone as the sole representative of a family, or as the source by separation of a new one, (e) must needs pass to him who has the *sacra*. To the begotten son the *sacra* pass of right and of necessity (f) to the adopted son, they can pass only by means of the sacred rites supposed to be efficacious in bringing him under the same tutelary divinities as his adoptive father, and imparting to him the father's ceremonial virtue. Such ceremonies as the *putreshti*, and especially the *datta-homa*, are not there-

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(a) This Section has once or twice been referred to under the title of the "METHOD OF ADOPTION," but on a review of the materials a more comprehensive title seemed preferable.

(b) Above, pp. 947, 948; Smith's Dict. Ant. Tit. Adoptio. Cic. Pro. Domo Sua, Chap. 13.

(c) See above, p. 930; Datt. Mîm. Sec. V. 56; Vyav. May. Chap. IV. Sec. V. paras. 8, 37, 38.

(d) Manu IX. 126, 141, 142, 169.

(e) Above, p. 77.

(f) Comp. pp. 67, 873, 984, 995, above; Datt. Mîm. IV. 27 ss.

fore to be looked on as mere excrescences. (a) In theory at least they are as important as the gift and acceptance, since without them the reception is defective and the spiritual end cannot be attained. (b) Men of the mixed and lower castes, as they became imbued with the Brâhminical doctrines, (c) conceived that for them too as for the pure twice-born, there might be a future of beatitude secured by religious services performed in this world by sons duly adopted, (d) but this adoption, according to the same set of ideas, involved a dedication to the manes of the adoptive family, and the acquisition of spiritual fitness for its sacra. Thus amongst most of the classes aspiring to spiritual and social rank the religious ceremonies have grown to be regarded as at least religiously essential. (e) It is a mark of inferiority and remoteness from Brâhminical connexion that they should be superfluous or simply optional in any caste.

But while this continued extension of the Brâhminical ceremonies has been favoured by caste ambition other causes have worked in the contrary direction. The excessive multiplication of ceremonies, natural to the sacerdotal class, made it impossible in many cases through poverty and other causes to fulfil them all, (f) and as some had to be dispensed with, the idea gained ground that perhaps none were absolutely indispensable. The ancient and probably indigenous system of adoption or fosterage (g) required no

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(a) Datt Mīm. V. 56.

(b) Datt. Mīm. IV. 33, 36, 41.

(c) Above, pp. 924, 926.

(d) See above, p. 922.

(e) See above, p. 909. The state of things in Gujarâth where Brahminical influence of the Marâtha and Benâres schools is of quite recent introduction, is an exception that tends to prove the rule.

(f) Comp. Steele, L. C. 159.

(g) Above, pp. 919, 925; Norton, L. C. vol. I. p. 83.

more than a gift, where a capable giver existed, and a taking by the ceremonial parent. (a) On this the Brāhminical ritual was grafted to a varying extent. It could hardly be said with certainty what rites would by caste custom in any particular instance be deemed indispensable and which only desirable. Ignorance, haste, and other causes led to irregularities in adopting which it was highly desirable not to consider fatal to the affiliation. In some castes the spiritual purpose was disregarded, while the influence of example supported imitative ceremonies as a usual practice. (b) Except amongst the Brāhmanas perhaps nothing is precisely fixed and definite beyond a formal giving and receiving, and by a reflex action the religious ceremonies have become less essential even amongst the Brāhmanas than in the earlier time when they were a more peculiar people, more markedly distinct from the other castes. The wish for a temporal heir and for an object of parental affection has grown in importance as the keen appreciation of the spiritual need has declined, so that in Madras at least it has become an established doctrine that mere gift and acceptance will constitute adoption even amongst Brāhmanas. (c) In Bombay no Śāstri, so far as can be discovered, has ever lent himself to this laxity of practice. The religious ceremonies are rigorously insisted on, at any rate for Brāhmanas, though some indulgences in the actual performance of them have been countenanced. The definition of the essential ceremonies however is unsettled; the datta-homa is always prescribed in addition to the formal giving and taking, but beyond this it would be hard to say that any rite has been sufficiently pronounced indispensable. Even in the case of Brāhmanas the Courts have shown a disposition to exact as little as possible of mere ritual, (d) and the customary

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(a) As amongst the Talabda Kolis and others, *see above*, p. 927.

(b) *See above*, p. 922.

(c) *See also above*, p. 922.

(d) *See above*, pp. 922, 923.

ceremonies enumerated by Steele (a) embrace all probably that would in any case be held essential. In some of the cases (b) reference is made to a supposed efficacy of the ceremony for civil, though not for religious, purposes. (c) Even Sir T. Strange seems to have had a similar idea. (d) It must be pronounced altogether foreign to the Hindû law. (e) It is in virtue of his religious capacity that the adopted takes the place of a born son. (f)

A. 1.—THE ACT OF ADOPTION—ITS CHARACTER  
AND ESSENTIALS AS TO THE GIFT.

A gift, (g) which is attended with retention of ownership, even in part by the donor or subject to a condition precedent, is not by the Hindû law regarded as valid. (h) The considerations which apply to gifts in general are of more than usual force in the case of adoption. It is manifest that the intended purpose of adoption cannot be realized if the natural father's rights in the adopted son are retained. If the status of the son is subject to contingencies his position and that of the family he has joined are painfully uncertain. (i) The solemn ceremonies prescribed for a complete adoption are intended to effect an immediate and complete trans-

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(a) See below, Sub-sec. D. 1.

(b) See also above, p. 947.

(c) See *V. Singamma v. Ramanuja Charlu*, 4 M. H. C. R. 165, and the cases there referred to.

(d) 1 Str. H. L. 96.

(e) See *Rajendro N. Lahoree v. Saroda Soonduree Dabee*, 15 C. W. R. 548; L. R. 3 I. A. at p. 193.

(f) See above, p. 873.

(g) A gift in case of adoption, not a sale. See above, p. 894.

(h) See above, pp. 187, 440.

(i) See above, pp. 187, 929. Rights inherent in a status governed by the family law could not, under the Roman system, be affected by a contract. See Dig. Lib. II. Tit. XIV. Fr. 34 (Poth. Pand. § 41).

fer of the boy from the spiritual sphere of the natural to that of the adoptive family. (a) As far as this point there is always a *locus pœnitentie*, but when once the gift is consummated no revocation is allowed (b); the capacity to give, which belonged to the natural parents, is not so acquired by the adoptive parents (c) that they can restore the son they have once taken.

It follows that a mere promise or engagement in *feri* cannot constitute an adoption. There must be a present unqualified gift and acceptance, just as in the case of marriages, otherwise there is no adoption. The Judicial Committee have insisted on the necessity (d) of the actual transfer in several instances. Colebrooke had previously said,—“A simple agreement to make an adoption, not carried into effect, will certainly not invalidate a subsequent adoption made with the requisite forms,” (e) and again “Be the mode of adoption what it might, this seemed indispensable; that, at whatever time it was contended to have taken place, it should be shown by the claimant, that the operative expressions had been used, indicative of the disposition to give, or to become adopted on one side, and to adopt on the other. The Hindû law has not prescribed any particular expressions on the occasion; nor does it require that adoption should be by writing. But it has provided, that the intent shall be expressed at the time; and, if the transaction be by writing, its whole genius and course teaches us to look for it there.” (f)

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(a) See Datt. Mim. V. 34; Vyav. May. Chap. IV. Sec. V. paras. 23, 29, 37, 38; and the formula 2 Str. H. L. 218.

(b) Steele, L. C. 184.

(c) Above, pp. 896, 916, 930. Under the Roman law the *patria potestas* of the adoptive father was subject to severe restrictions if he desired to use it by getting rid of the adopted son. See Inst. Lib. I. Tit. XI. § 3.

(d) Above, p. 923.

(e) Coleb. in 2 Str. H. L. p. 115.

(f) Coleb. in 2 Str. H. L. p. 143, 144.

In *The Collector of Surat v. Dhirsingji Vaghbaji* (a) Sir M. Westropp said :—" It is clear Hindû law that to constitute a valid adoption there must be a gift and acceptance," the gift after the father's death being competent only to the mother. It is only by reason of the gift indeed that the filial relation to the natural father is extinguished, or that the right of the son in the estate of the giver ceases. A mere deed or declaration by the alleged adoptive father that he has taken a boy as a foster son (*pâlak putra*) does not produce the effect of adoption. (b)

In a recent case (c) the Judicial Committee have recognized the nullity as an adoption of a gift and acceptance still in a measure in *fieri*, though the contract was made by a deed registered and expressed in the present tense. It was not necessary for their Lordships positively to decide whether there could be "an adoption simply by deed," because in the particular case there was an intention to complete the adoption by the ordinary ceremonies, but a strong opinion on the subject is intimated. "They desire, however, to say that they are far from wishing to give any countenance to the notion that there can be such a giving and taking as is necessary to satisfy the law, even in a case of *Śûdras* by mere deed without an actual delivery of the child by the father." The delivery accompanied by the requisite declaration of transfer of right makes a perfect gift forthwith. The adopted son must be given, not sold, (d) as the *Kṛita* adoption is now disallowed. Hence an agreement by which the natural parents stipulated for an annuity to themselves as a consi-

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(a) 10 Bom. H. C. R. 235, referring to 1 Str. H. L. 95 ; *Manu* IX. 168 ; Mit. Chap. I. Sec. XI. para. 1.

(b) *Nilmadhab Das v. Biswambhar Das*, 12 C. W. R. P. C. 29 ; S. C. 3 B. L. R. P. C. 27 ; S. C. 13 M. I. A. 85.

(c) *Mahashoya Shoshinath Ghose et al v. Srimati Krishna Soondari Dasi*, L. R. 7 I. A. 250.

(d) See further below, Sub-sec. A. 6.

deration for giving their son in adoption was pronounced illegal. (a)

The gift must be expressly in adoption, as in the case of a wife the gift must be as in marriage. According to the Hindû law a mere gift in either case without the attendant volition would be the bestowal merely of a slave. (b) The religious ceremonies are important even where they are not regarded as essential, if only as marking clearly the specific nature of the gift and acceptance.

The assent of the mother, either natural or adoptive, is not absolutely necessary if her husband assents to the adoption. Without her assent "the mother's claim is not annulled by the donation," (c) but this claim is merely a moral one, making it expedient but not necessary to obtain a release from her as from the natural father of the son's filial duty. (d) For jural purposes a gift by the natural father suffices: and as an adoption is made for the sake of the sonless man his acceptance of a son in adoption suffices without the assent of his wife, as shown in the previous Section.

#### A. 2.—THE ACT OF ADOPTION.—CHARACTER AND ESSENTIALS AS TO THE ACCEPTANCE.

"Acceptance in a certain form is the efficient cause of filiation." (e) Hence there must be evidence of the taking as well as of the giving. (f)

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(a) *Eshan Kishor Acharjee v. Harischandra Chowdhry*, 13 B. L. R. 42 App.

(b) Coleb. Dig. Bk. V. T. 273; above, p. 935.

(c) Coleb. Dig. Bk. V. T. 273 Comm.; see 2 Str. H. L. 131.

(d) Coleb. Dig. Bk. V. T. 275 Comm.

(e) Coleb. Dig. Bk. V. T. 275 Comm. The salutation already noticed, p. 949, or the kissing of the boy's forehead, as it is described in Sutherland's translation of the Datt. Chand. Sec. II. 7, is a solemn indication of acceptance. See too Vyav. May. Chap. IV. Sec. V. para. 8.

(f) *Laxman bin Santaji v. Malu bin Ganu*, S. A. 550 of 1874.

The free consent of the giving and receiving parents is indispensable. (a) It is but rarely that a question on this point can arise when the giver and receiver were adult males, but in the case of women, and in that of minors, taking in adoption, should the practice be recognized (b) there is obviously room for abuses which ought to be guarded against. Fraud and cajolery practised on a widow, in inducing her to adopt, will be relieved against, (c) and a Hindû female, acting unguided by disinterested advisers, ought not to be prejudiced by her acquiescence in an adoption or a will. (d)

The gift and acceptance cannot be replaced by any other intimation of desire or consent. "Education and nurture do not constitute any relation entitling to inheritance." (e)

Although amongst Śūdras no religious ceremony is necessary except in case of marriage, (f) yet an adoption, even amongst Śūdras, must be completed by corporeal gift and acceptance. (g) A Śūdra took a boy of four years old, intending to adopt him, and thenceforth supported him, but never actually adopted him, and in course of time had three begotten sons. The Paṇḍit said this gave the boy no right as a son to share the estate, only a right to be settled in marriage. (h)

(a) Steele, L. C. 335.

(b) See above, p. 905, Note (d).

(c) *Bayabai v. Bala Venkatesh*, 7 Bom. H. C. R. App. 1. See *So-masekhara Rāja v. Subhadramāji*, I. L. R. 6 Bom. 524.

(d) *Tayammaul v. Sashachalla Naiker*, 10 M. I. A. 429.

(e) Coleb. in 2 Str. H. L. 111.

(f) *Sreemutty Joymoney Dossee v. Sreemutty Sibsoondaree Dossee*, Fult. R. 75, 76; 2 Str. H. L. 89.

(g) *Mahashoya Shosinath Ghose v. Srimati Krishna Soondari Dasi*, L. R. 7 I. A. 250.

(h) 2 Macn. H. L. 198; below, Sec. VII.



## A. 3.—THE ACT OF ADOPTION—ASSENT OF THE SON.

Manu (a) prescribes that the son given shall be not only of the same class but "affectionately disposed." This implies an assent by the boy capable of discrimination (b) as a token of the requisite disposition. Accordingly Jagannātha prescribes that "no son must be given away against his will." (c)

## A. 4.—THE ACT OF ADOPTION—CONTRACT OF ADOPTION.

An agreement to adopt a child is not rendered void by the death of one of the parties, husband and wife, who executed it. If the husband at his death refers to the agreement, the wife is authorized to adopt the child mentioned in the agreement. (d)

A mere agreement to adopt however is not itself an adoption, and will not invalidate a subsequent adoption made with the requisite forms. (e) Nor probably would such an agreement be specifically enforced any more than a contract of betrothal. (f)

(a) IX. 168.

(b) See Datt. Mim. Sec. IV. 47.

(c) Coleb. Dig. Bk. V. T. 275 Comm. See above, pp. 930, 931. A child under eight years is considered as (dependent as) one unborn. Thence to sixteen he is called a *bāla* or *paganda* (adolescent); after that he is of full age. Nārada quoted in Viv. Chint. Transl. p. 35. Hence the Śāstris rule in favour of the widow's guardianship of a child under eight, at which age it is superseded by that of the paternal relatives. After eight years of age sufficient intelligence for religious acts is usually attributed to children, and the assent of a child so advanced is requisite to his adoption. It ought in strictness to be proved in contentious cases.

(d) *Ry. Sevagamy Nachiar v. Heraniah Gurbah*, 1 Mad. Sel. Dec. 101; see also *Bhala Nahana v. Parbhu Hari*, I. L. R. 2 Bom. 67, quoted below under Sub-sec. A. 7.

(e) Coleb. in 2 Str. H. L. 115, 135.

(f) See *Umed Kikā v. Nagindās Narotamdās*, 7 Bom. H. C. R. 122 O. C. J.; *In re Gunput Narain Singh*, I. L. R. 1 Calc. 74; Spec. Relief Act I. of 1877, Secs. 12, 21, 22.

*Challa Papi Reddi v. Challa Koti Reddi* (a) was a case in which a man *A*, adopted by his father-in-law according to the Illatam custom noticed elsewhere, (b) associated another son-in-law *B*, with himself. This was not a case of adoption, but the son of *A* was held bound by the engagement to *B* that he should share the estate with *A*.

#### A. 5.—THE ACT OF ADOPTION—PROOF OF THE TRANSACTION.

The fact of an adoption having been made or attempted, may be involved in varying degrees of doubt. The principles which govern the reception and appreciation of the evidence adduced in contested cases do not differ from those which operate in other departments of the law; but the special nature of the facts involved has given rise to many decisions which bear on the question of the sufficiency of particular acts and statements to constitute adoption. The same cases might properly be placed in Section VIII. on the Litigation connected with Adoption; but it may be convenient to consider them here in close connexion with the legal essentials of gift, acceptance, and assent in the act of adoption. (c)

The Courts have varied considerably in their views of the completeness of the proof of an adoption, which may properly be exacted before it is recognized in a contested case. No precise rules can be gathered from the decisions, except these, that the evidence must point to a real adoption, not to some connexion substituted for it, and that the religious ceremonies, even when not absolutely necessary, are in most castes so usual that the non-performance of them detracts much from the proof of a disputed adoption.

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(a) 7 M. H. C. R. 25.

(b) Above, p. 421. For a similar institution, see Index "Ghar-jawáhi," or Steele, L. C. 358.

(c) It will be seen below that the conduct of those interested has, in several instances, virtually been allowed to replace an act of adoption in constituting the legal relation. Occasionally even where an adoption was *prima facie* impossible. See p. 1096 (d).

## A. 5. 1. MEANS OF PROOF.

In no case, it was laid down, should the rights of wives and daughters be transferred to strangers or remote relations, unless the fact of the adoption be proved by evidence free from suspicion of fraud, and so consistent and probable as to give no occasion for doubt of its truth. (a)

The Court may exact but slight evidence of the performance of ceremonies on proof of the husband's permission to a widow to adopt. But from the mere observance of ritual forms no inference can be made of the permission. (b)

For the validity of an adoption it is not sufficient to prove that the adoption was attempted *bonâ fide*, but satisfaction of the requirements of the Hindû law must be proved. (c) "Even a brother's son does not become adopted by the mere performance of other sacraments for him without the ceremonies of adoption." (d) A person, immediately on the death of his wife from cholera, asked his brother to give him his son in adoption. The brother assented, but urged the necessity of ceremonies, which were reserved for next day. The adopter also died from cholera the same day as the wife, and the ceremonies remained unperformed. The boy went through the funeral ceremonies of the deceased person. These facts were held not to constitute a valid adoption by gift and acceptance. (e) Performance of funeral rites by an alleged adopted son and acquiescence of the adopter's widow will not sustain the validity of an adoption, unless it clearly appears that the act

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(a) *Sootrugun Sutputty v. Sabitra Dye*, 2 Knapp, p. 287; S. C. 5 C. W. R. P. C. 109.

(b) 1 Hay, 311.

(c) *Teelok Chundur Race v. Gyan Chundur Race*, Beng. S. D. A. R. 1847, p. 554.

(d) MS. 585.

(e) *Kenchava v. Ningapa*, S. A. No. 645 of 1866, 10 Bom. H. C. R. 265.

itself was performed under circumstances rendering adoption legal. (a)

Long possession under an adoption will avail nothing if the adoption fails. (b) "A man not regularly adopted, but who has lived as a member of an undivided family for 25 years, may be ejected from the joint property by the other members." (c)

Still less will mere residence and general recognition avail according to some of the cases. Thus it was held that in the absence of any formal adoption a sister's son residing in his uncle's house from childhood, and recognized and treated as his son, does not acquire the legal status of adopted son. (d) And similarly that in the absence of any agreement mere residence with the family into which his aunt had married gives no right to any one to a share of the family property. (e)

A man having bought or otherwise taken a boy and brought him up as a foster-child, bequeathed part of his property to him. The Sâstri pronounced him disentitled to any more as against the blood relations in the absence of a formal adoption. (f)

As to the nature of the evidence required no merely technical rules have been prescribed. Thus an adoption which took place 60 years ago may be proved by oral evidence. (g)

(a) *Tayammaul v. Sashachalla Naiker*, 10 M. I. A. 429.

(b) *R. Haimun Chull Singh v. Koomer Gunsheam Singh*, 2 Knapp. 203; S. C. 5 C. W. R. P. C. 69. See above, pp. 927 ss.

(c) MS. 123.

(d) *Bhagvan Dullabh v. Kala Shankar*, I. L. R. 1 Bom. 641.

(e) *Y. Venkata Reddi v. G. Soobba Reddi*, M. S. D. A. Dec. 1858, p. 204.

(f) MS. 122. See above, p. 927; and p. 374, Q. 19.

(g) *Basappa v. Malan Gavda*, S. A. 229 of 1867. It will be seen that no writing is necessary to an adoption, though amongst some classes it is usual. Steele, L. C. 184.

Ocular testimony may indeed be dispensed with. The adoption of a son was held proved on strong circumstantial evidence, in the absence of direct proof of the performance of the necessary ceremonies. (a)

#### A. 5. 2.—PRESUMPTION IN FAVOUR OF ADOPTION.

Though a true adoption is impossible without the essential ceremonies, (b) the Courts have in many instances given effect to adoptions of which the direct proof was insufficient. In some of the cases the proof entirely failed. The conduct of the members of the adoptive family it was thought had in such cases created an estoppel against their denying the adoption, or else there had been so long an acquiescence in the adoptive status that the son could not, without extreme hardship, be deprived of his sonship. (c) To make them consistent with the general principle such cases ought to be referred, as generally they may be, consistently with the known facts, to a presumption of adoption arising from the circumstances. The position of an adopted son under such circumstances resembles that of an heir in whose favour, after long possession every reasonable presumption will be made. (d)

It depends upon the probabilities of each case under what circumstances an adoption may be recognized in the absence of the original deed. (e) There needs not, however, be a deed: the Śâstri says—"If one maintain another for a length of time, professing to have adopted him, and in fact committing

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(a) *Perkash Chunder Roy v. Dhunmonee Dassia*, Beng. S. D. A. R. for 1853, p. 96.

(b) i. e. at least the transfer, and in the case of a Brâhmana, the homa, according to nearly all opinions.

(c) See *Bhala Nahana v. Parbhu Hari*, I. L. R. 2 Bom. 67.

(d) See *Rajendronath Holdar's* case below, p. 1096 (a). Where the question is of the due performance of ceremonies, the presumption arises that all was rightly done.

(e) *Roopmonjooree v. Ramlall Sircar*, 1 C. W. R. 145.

all his affairs to his charge, having, upon his beginning to do so, invited and entertained his relations, acquainted the magistrate, and drunk manjane, he cannot afterwards abandon the young man so adopted in favour of another; nor is the adopted compellable to renounce the connexion so formed. The relation of an adopted needs no writing for its support." (a)

A presumption arises that an adoption was duly made from the undisputed performance by the adopted in question of the *kriya* and *paksha* ceremonies for the members of the family of adoption. (b) The decisions agree with this, as in the following instances:—In the case of a brother's son recognized for many years and allowed by the family to perform the funeral rites of the deceased a presumption was admitted in favour of the adoption. (c) So proof of the performance of ceremonies was dispensed with where the adoption was recognized for a series of years and the adoptee had possession of property, (d) notwithstanding the continued residence of the adoptee with his natural parents. (e)

A gift by a duly authorized person in adoption is to be presumed from an adoption which has been acquiesced in for 33 years. (f) But a shorter time will suffice. An adopted son, whose adoption by a widow under a power from her

(a) 2 Str. H. L. p. 113.

(b) Steele, L. C. 184. *Kriya* = performance, obsequies; *Paksha* = fortnightly, periodical. See Steele, L. C. 27.

(c) *Veerapermal Pillay v. Narrain Pillay*, 1 Str. 91; *Behari Lal Mullick v. Indramani*, 13 B. L. R. F. B. 401; S. C. 21 C. W. R. 285; *Nityanand Ghose v. Kishen Dyal Ghose*, 7 B. L. R. 1; S. C. 15 C. W. R. 300.

(d) *Sabo Bewa v. Nahagun Maiti*, 2 B. L. R. App. 51; S. C. 11 C. W. R. 380; *Rajendro Nath Holdar v. Jogendro Nath*, 14 M. L. A. 67; S. C. 15 C. W. R. 41 P. C.

(e) *Venkangavda v. Jakangavda*, Bom. H. C. R. P. J. 1875, p. 49.

(f) *Anandray v. Ganesh Yeshwantray*, S. A. 373 of 1863.

husband with publicity and formality, was acted on and recognized for 27 years by the family, died possessed of property. His adoption was held good until it should be rebutted by evidence of the strongest kind, after making due allowance for all imperfections of evidence on the side of the defendant arising from lapse of time; for otherwise the adoptee would be deprived of his estate in both families, natural and adoptive. (a)

A plaintiff, suing for a declaration that an adoption is invalid, is even bound, it was said, to prove its invalidity, (b) where an adoption took place long ago and has been acted on, and the defendants are in possession by virtue of the adoption. (c)

The presumption has even been carried within the sphere of the law, where this was opposed to the adoption. Thus the adoption of a sister's son was upheld solely upon its having been recognized for a long time, and the impossibility of cancelling it without seriously affecting the rights of the adoptee. (d)

(a) *Rajendro Nath Holdar v. Jogendro Nath*, 14 M. I. A. 67; S. C. 15 C. W. R. 41 P. C.; *Sayamalal Dutt v. Saudamini Dasi*, 5 B. L. R. 362; *C. Herasutoollah v. Brojo Soondur Roy*, 18 C. W. R. 77.

(b) *Brojo Kishores Dassee v. Sreenath Bose*, 9 C. W. R. 463; S. C. 8 C. W. R. 241; *Hur Dyal Nag v. Roy Krishto Bhoomick*, 24 C. W. R. 107. See the cases in Note (a).

(c) *Gooroo Prosunno Singh v. Nil Madhub Singh*, 21 C. W. R. 84.

(d) *Gopalayyan v. Baghupatiayyan*, 7 M. H. C. R. 250. The High Court however rejected the custom specially found by the District Court, and found "that communion had been created by the course of conduct of the plaintiff and his family." This illustrates Note (c) to Sub-section A. 5. above, p. 1091. The subsequent behaviour of the parties could not make that an adoption which really was not one. See the case cited below A. 5. 4. As far as the plaintiff was concerned the decision might have been placed on estoppel, but the one actually arrived at could be supported only on an absolute presumption against the rule of law as conceived by the Court.

A man having engaged that his daughter-in-law should adopt a person, and the latter having performed the promisor's funeral rites, the Śāstri said that though no regular ceremony of adoption had been celebrated, yet the adoption, if the adopted was a *sapiṇḍa* of the deceased, might be considered valid. (a) This opinion is not easy to reconcile with others or with the recognized authorities. What the Śāstri meant probably was that a formal gift and acceptance might be presumed, and that this in the case of a *sapiṇḍa* would constitute an adoption.

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A. 5. 3.—ESTOPPEL.

The doctrine of presumption in favour of adoption (b) has been carried further, or else considerations not strictly applicable perhaps to questions of status have been held to prevent the questioning even of an apparently invalid adoption by one who had countenanced it. In the case of an adoptive father, long recognition by one of another as his adopted son was said by the Śāstri to make an attempted supersession by another adoption illegal. Colebrooke placed his assent to this on the ground that "the circumstances authorized the presumption" that an adoption had "been actually made," (c) but the Śāstri considered the father bound as by estoppel.

An admission of the title of an adopted son was held strong evidence to uphold an adoption of a sister's son by a *Vaiśya*. (d) The admission has been made three times by the undivided brother of the deceased adopter. It was apparently held that the depositions were "decisive of the

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(a) MS. 1682.

(b) See the cases under A. 5. 4.

(c) 2 Str. H. L. 113.

(d) *Ranalinga Pillai v. Sadasiva Pillai*, 9 M. I. A. 506, 515; S. C. 1 C. W. R. 25 P. C. The effect of this must not be carried too far. It is limited by *Gopee Lall's* case, below.



case" as "an admission of the whole title of the respondent both in fact and in law."

Active participation in the plaintiff's adoption by defendant's brother; acquiescence therein by many subsequent acts on the part of the defendant; letting the adoptive father die in the belief that the adoption was valid; concurrence in the performance of the funeral ceremonies by the plaintiff, were held to estop the defendant from disputing an adoption. (a) Nor need the case be quite so strong. Presence at, and acquiescence in, an adoption and association with the adopted son as such in legal proceedings estop a person, it was held, from disputing the adoption. (b) The Sadar Court of Madras went even so far as to say that the legality of an adoption cannot be challenged by one who has consented to it. (c) The Court must have thought that a duty was incumbent on the adopter's brother, the person in question, to protest or interfere.

Where with full knowledge of the invalidity of the plaintiff's father's adoption, as declared by the Court, the defendants had admitted plaintiff to a share in the family estate and executed a document to that effect, this was held binding on the defendants. (d)

Admissions however or acquiescence caused by mistake will not create an estoppel, as when the Judicial Committee say: "It has been argued on the part of the appellant that the defendant in this case is estopped from setting up the true facts of the case, or even asserting the law in her favour, inasmuch as she has represented in former suits and in various ways, by letters and by her actions, that Luchmunjee was the adopted son of Damoodurjee, adopted

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(a) *Sadashiv Moresbwar v. Hari Moresbwar*, 11 Bom. H. C. R. 190.

(b) *Chintu v. Dhondu*, 11 Bom. H. C. R. 192A.

(c) *Pillari Setti Samudrala Nayudu v. Rama Lakshmana*, M. S. D. A. R. 1860, p. 91.

(d) *Govind Balkrishna v. Mahadev Anant*, Bom. H. C. P. J. 1872, No. 31; P. J. 1873, No. 66.

by Damoodurjee's widow, his mother. But it appears to their Lordships that there is no estoppel in the case. There has been no misrepresentation on the part of Luchmunjee, or the defendant, on any matter of fact. She is alleged to have represented that Luchmunjee was adopted. The plaintiff's case is that Luchmunjee was in fact adopted. So far as the fact is concerned, there is no misrepresentation. It comes to no more than this, that she has arrived at a conclusion that the adoption which is admitted in fact was valid in law, a conclusion which in their Lordship's judgment is erroneous; but that creates no estoppel whatever between the parties." (a)

Thus too as to an alleged adoption by a dying man, it was said that acquiescence in the adoption by a widow who afterwards contested it, would not give it validity unless validity arose from the act itself and the circumstances under which it was performed. (b)

In another case, however, of less authority, widows who after their husbands' death, had completed the ceremony of adopting a brother begun by him, were not allowed afterwards to question the validity of the adoption. (c)

#### A. 5. 4.—RATIFICATION.

A similar principle to that set forth in Sub-Section 5. 3, must, it seems, be applied to the case of a ratification of adoption by widows or male sapindas. (d) The adoption must originally have been either valid or invalid, and in the latter

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(a) *Gopee Lall v. Musst. Sree Chundraolee Buhoojee*, 11 B. L. R. P. C. 391, 395; S. C. 19 C. W. R. 12 C. R.

(b) *Tayannmaul v. Sashachalla Naiker*, 10 M. I. A. 429.

(c) Above, pp. 968, 1028. The adoption must have been palpably void, unless warranted by a particular custom.

(d) See *The Collector of Madura v. Ramalinga* (Rammad case), 2 M. H. C. R. at p. 233.

case it could not really be ratified as being essentially null. (a) The assent of the sapinda, when it is necessary at all, is necessary as a condition precedent to the efficacy of the widow's act. If the new status is not acquired the old one continues, with respect not only to the non-assenting sapinda but with respect to others. (b) In such a case the doctrine of ratification is not properly applicable. (c)

#### A. 5. 5.—LIMITATION.

The Limitation Act XV. of 1877, Sch. II. Art. 118, prescribes six years after an adoption becomes known to a plaintiff as the time within which he must sue for a declaration that it was invalid or never took place. The mere omission however by a particular person to sue cannot have the effect of validating a void adoption. The particular suit by the individual is barred, but otherwise the law, it is apprehended, operates as before. (d) Similar considerations apply to Art. 119, which prescribes for a suit for a declaration of the validity of an adoption "six years from the time when the rights of the adopted son as such are interfered with." The status is not lost by forbearing to sue in a single instance.

(a) *Comp. Rangamma v. Atchamma*, 4 M. I. A. at p. 103.

(b) *Bawāni Śaṅkara Paṇḍit v. Ambabāy Ammal*, 1 Mad. H. C. R. 363.

(c) See *Rangubāi v. Bhāgirthibāi*, 1 L. R. 2 Bom. 377; *Bateman v. Davis*, 3 Madd. 98; 2 W. & T. L. C. 806 (3rd Edn.); *Wiles v. Gresham*, 2 Drewry 258; S. C. 23 L. J. Ch. 667; Com. Dig. Confirmation (D 1); Shep. Touchst. 117, 311, 313, 314; *Armory v. Delamirie*, Notes 1 Sm. L. C. 306 (5th Edn.) "Ratification" is not a strictly correct term in relation to an act not done on behalf of those whose concurrent assent is needed to give validity to an act by another on her own behalf. Nor can ratification really change a state of facts, or touch the rights of third parties. See Maynz, Dr. Rom. Lib. I. § 34, 85.

(d) See below, Sec. VIII.

## A. 6.—TERMS ANNEXED TO ADOPTION.

It seems for the reasons already set forth that an adoption subject to a condition, whether precedent or a condition subsequent of defeasance, is impossible: (a) a contract cannot be made that the validity of an adoption, any more than of a marriage, shall be contingent on a certain volition or event. Nor can it be postponed in operation; its effect is immediate or not at all. (b) These rules spring from the nature of the institution, (c) which equally prevents other terms being appended, such as liberty to give back the boy

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(a) Above, p. 187. See too Di. Lib. 50, Tit. 17, Lex. 77.

(b) *Ib.* The formula of gift imports this.

(c) By the Roman law, until a late period, mancipation was an essential part of adoption, and mancipation was a solemn public act. Like some other important jural acts it could not be done subject to a condition or to a term postponing its effect to a future day. Such qualifications were abhorrent to the simplicity of primitive ideas, and too great a burden for the memory of the witnesses by whose recollection, in case of future dispute, the transaction would have to be proved. See Goudsm, Pand. p. 155; Maynz, Dr., Rom. III. 86, 87 (3rd Edn.); Maine, Anc. Law, p. 206 (3rd Edn.). As society advanced the magistrate became of more, and the witnesses of less importance, but in exercising a kind of voluntary jurisdiction he long preserved the old forms, and he had to guard the interests of the community as these became more clearly conceived. The considerations stated at p. 187 above then rose into manifest importance. Disastrous results must sometimes arise from its being a conditional matter, whether a certain man is, or is not, the husband of a certain woman, or the legal father of a certain other man. So too as to the celebration of the sacra by a person of doubtful competence. The family law consists for the most part of defined duties and rights annexed to mutual relations understood as absolute, and fixed once for all by birth, marriage, and other events of an invariable character, whoever may be the subject of them.

Some authentication of adoptions would prevent many law-suits in India. As to the use of public authentications of transactions under the Roman and the Teutonic systems, see Meyer, Inst. Jud. Tom. I. p. 305 ss. The records of the Courts in England were originally the recollections of official witnesses. See Bigelow, Hist. Proc. pp. 318 ss.

adopted or to adopt other sons which would involve the parties most concerned in perilous uncertainties. (a) The disposal of the adoptive father's estate should, according to the older Hindû law, be governed by rules as little subject to individual caprice as any within the system, but as separate property, and freedom of disposal have grown up, endeavours have been made to retain the spiritual advantages of adoption while avoiding the risks of handing over properties to the adopted sons. Certain terms as to property on which a boy is adopted are frequently committed to writing; and how far, if at all, they bind the adopted son, is becoming a question of great practical importance. (b)

By adoption a widow of a Hindû severed from his brethren deprives herself of her interest in the estate. (c) The adopted son immediately displaces her as heir with a retro-active effect. (d) In order to prevent this a widow sometimes endeavours to annex terms to the adoption by which she is secured a life interest in the estate and the management of it. Effect has been given to bargains of this kind in some instances, but the Śâstris have not approved them, and they must be regarded probably as opposed to the strict Hindû law of the Śâstras. It has been said that as a father may even sell his son (e) much more may he part with him in adoption on such terms as he thinks reasonable. But the sale of a son (f) is allowed only as a last resource in a time of distress. (g) The Kṛita adoption by purchase is distinctly

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(a) Comp. p. 90.

(b) See above, p. 187.

(c) Steele, L. C. 47, 48, 185, 186, 188.

(d) 2 Str. H. L. 127; below, Sec. VII.

(e) Coleb. Dig. Bk. III. Chap. I. T. 33 Com.

(f) 2 Str. H. L. 224. See above, pp. 894, 896.

(g) Yājñavalkya prohibits it wholly. See Coleb. Dig. Bk. II. Chap. IV. TT. 7, 16. See below.

forbidden, (a) so that the *à fortiori* argument is met by a prohibition in a nearer case. The adopted son ranks as if born at his adoptive father's death: his mother could not appropriate to herself the estate of her child; nor could she as his guardian legally make a gain for herself at his cost out of a transaction in which she was bound to do the best for her ward. The adoption invests the adopted with the estate as a support for the sacra; the widow took it but provisionally in her lower capacity for securing beatitude to her deceased husband, (b) and this connexion being established by the law of the family is superior to a convention in which the adopted son himself takes no part. Where indeed he is of full age and assents to injurious terms it may be that he is bound to fulfil them, but it is as under a contract which cannot prevent the estate from passing to him the moment he becomes son to the deceased adoptive father. From the Hindû point of view indeed it is questionable whether in consenting to be adopted a man can lawfully accept terms which sever the estate, even temporarily, from the obligatory sacra; but as on acquiring the property he cannot be prohibited from dealing with it, the previous bargaining can hardly in practice be prevented in the case of an adult adopted son. (c)

Even in the case of adoptions by males terms are sometimes made which alter the rights and obligations properly incident to the position of the adopted son as such. It is not possible perhaps to draw a precise dividing line between the bargains and settlements of this kind allowed and

(a) 2 Str. II. L. 175 (Colebrooke).

(b) See above, pp. 93, 872, 985.

(c) Such a case as that of *Tara Munes v. Deb Narayan Rai*, 3 B. S. D. A. R. 387, could hardly now be upheld. The declaration of the adopted son that in certain events his adoption should be null could not make it null. As to agnatic rights the case is expressly provided against by the Roman law, Dig. Lib. 2, Tit. 14, Lex. 34.

disallowed by the Hindû law. (a) The principles already stated apply to them, and all are subject to the control of the Court as representing the Sovereign according to Hindû principles in protecting the weak and helpless. (b)

In the following case a contract was made which only expressed a right subsisting without it. A watandar's nephew adopted by him agreed to pay his daughter money in lieu of ornaments. On her death a balance remained due. Her daughter was pronounced entitled to claim it as "Saudayak stridhana" of her mother. (c) The Śâstri admits alternatively to the claim arising from family connexion that the son may have passed the agreement in consideration of the benefit he received by the adoption, but the case is but a weak one. The Śâstiris seem generally to have thought that limitations annexed to adoption by which the adopted son would be deprived of the usual advantages of his position could not be enforced. The decisions referred to above, p. 187, are on the whole to the same effect. In a case wherein a Lingayat of full age, about to be adopted by a widow, had agreed that she should retain the management of the estate, the Śâstri said that nevertheless the adopted son was entitled to the management, as the widow by adopting had necessarily become dependent (d) except as to her stridhana and her right to maintenance. (e) If the dependence of a widow having a son is regarded as a part of the public law (f)

(a) Under the Roman law the terms had to be examined and approved by a judicial officer of rank. If prejudiced the adopted son could get himself set free. See Inst. Lib. I. Tit. XI. § 3; Di. Lib. I. Tit. VII. ff. 32, 33.

(b) Manu VIII. 27; Viv. Chint. Transl. p. 300; Coleb. Dig. Bk. V. T. 450 ss; 2 Str. H. L. 80.

(c) MS. 1566.

(d) See Mit. Chap. II. Sec. I. p. 25; Manu V. 147, 148.

(e) MS. 1743.

(f) See Coleb. Dig. Bk. IV. Chap. I. T. 4, 6; Bk. II. Chap. IV. T. 35 Comm. *ad fin*; Bk. III. Chap. I. T. 52 Com.; 2 Str. H. L. 96.

creating a relation not variable by the will of the individuals immediately concerned, (a) this answer is correct, and such no doubt was the view of the Śāstri. As a part of the family law resting on sacred texts it may well be supported, and the legal relations of the parties in other respects would, for the most part, be defined by the law, (b) not left to the exercise of free volition, but it does not appear that the principle has so far been distinctly embodied in any adjudication of the superior Courts.

In another case a similar agreement had been made with the adopting father and mother. On the death of the father the Śāstri said the adopted son succeeded to his estate, but that it would be (morally) wrong for him to break his agreement and disobey his mother, unless she was wasting the property through ill-will towards the son. (c) The Śāstri, as in the case noted above, p. 187, must have thought the condition so repugnant to the status taken by adoption, that effect could not be given to it. In the case of a *kṛitrima* adoption however (d) the Judicial Committee appear to have thought that such a condition might be annexed to the adoption, and in *Ramasawmi's* case (e) it was held that an agreement by the real father in derogation of the rights as adopted son of his son whom he was giving in adoption "was not void, but was at the least capable of ratification when the son came of age." But what requires ratification admits of repudiation, so that if ratification was necessary (which is not said) the son could not be prejudiced by such a transaction as the one in question. The Śāstris' opinions therefore can hardly be said to have been authorita-

(a) See *In re Kahandds Nārandds*, I. L. R. 5 Bom. at p. 164.

(b) See above, p. 367 Note (c).

(c) MS. 1728.

(d) *Musst. Imrit Koonwar v. Roop Narain*, Pr. Co. 15th March 1879 ; 6 Cal. R. 76.

(e) Above, p. 187.



tively set aside, and though an adopted son may resign his rights (a) it does not seem consistent with the older principles of the Hindû law, as set forth in the Śâstras, that a man, still less that a woman, adopting a son should be at liberty at the same time to disinherit him, and so sever the estate from the obligation to perform the sacra and maintain the helpless members of the family. Nor can the real father properly give his son on such terms. A father has not ownership in his son as in a chattel. (b) This is obviously important with reference to the possibility of accepting conditions injurious to the son, such as might arise through arrangements of the kind recognized in *Vinayak Narayan Jog v. Govindrav Chintaman Jog*, (c) *Chitko Raghunath v. Janaki*, (d) and in *Radhabai v. Ganesh Tatya Gholap*, (e) however defensible in particular cases these may be on other grounds.

It would seem from the considerations that have been stated that the Śâstris' view of this subject can hardly be contested on the ground which they have chosen. But it is certain that it is not allowed to govern the actual practice of the people; amongst whom fair arrangements for the protection of the widow's interest, during her life, are commonly made, and are always supported by the authority of the caste. (f) This is especially the case when the property was newly-acquired by the father: it is generally felt as to such property that his wishes expressed or understood ought to prevail, and that his widow has an interest which ought to be protected. (g) Sometimes the husband settles terms in an adoption made by himself. Sometimes he annexes to his will or to his permission to adopt specific terms as to the

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(a) See above, pp. 340, 358.

(b) Vyav. May. Chap. IV. Sec. I. paras. 11, 12, and Sec. IX. para. 2.

(c) 6 Bom. H. C. R. 224.

(d) 11 Bom. H. C. R. 199.

(e) I. L. R. 3 Bom. 7.

(f) The answers to Questions 3, p. 366, and 10 p. 370, above, were no doubt influenced by a sense of this.

(g) Comp. above, p. 653 Note (c).

enjoyment of his sole or separate property. In some cases he leaves the whole or part of his property to relatives or to a charity, subject perhaps to a life interest of his widow or some other person. In other cases he gives no direction and dies intestate. Somewhat different questions arise under these different circumstances, and different views have been taken by the authorities.

In the case of an alleged adoption by a male of a nephew on condition or with a reserve to the wife of the adopter of a life enjoyment of the immoveable property, and after her death of the self-acquired property to the adopter's daughters, the Judicial Committee said only that it would take very strong evidence to prove such an adoption, and held it had not been proved. (a)

In *Vinayak v. Govindrao* (b) a direction was given to adopt a nephew by a will which greatly limited the estate to be taken by him as son. This was upheld on the ground that a sufficient provision was made for the adopted son and that he, after his adoption, had assented to the will and taken the benefit which it secured to him.

In a case however in which a will was thought effectual by the Pandits, they added :—" If the testator had really given his wife verbal instructions to adopt a son in the event of her not bearing male issue, her compliance with those instructions would of course invalidate the will according to the Hindû law, it being incompetent for the testator, who authorized the adoption of a son, to alienate the whole of his estate, (c) and thereby injure the means of the maintenance of his would-be-heir." (d)

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(a) *Imrit Komwar v. Roop Narain Singh*, 6 Cal. R. 76.

(b) 6 Bom. H. C. R. 224 A. C. J.

(c) See above, pp. 216, 648, 758; Vyav. May. Chap. IX. para. 2.

(d) *Nagalutchmee Unmal v. Gopoo Nadaraja*, 6 M. I. A. 320. See above, pp. 213, 214, 219, 220.

In the case of an authority to adopt, unaccompanied by limitations of the property, the Judicial Committee said that—“A son adopted under a permission by a widow takes as such by inheritance from his adoptive father, not by devise.” (a) If he takes without qualification as a son by inheritance it does not seem consistent with that, that he should be subjected to other terms by either adoptive parent than such as could be imposed on a son by birth. This was the view taken by the Śâstri in the case referred to at p. 187. He pronounced the adopted son’s right unaffected by stipulations imposed on him by the widow in her own interest.

The terms stated in the deed, where there is one, usually embody the notions of the parties as to the legal effect of the adoption, (b) but this is by no means always the case. In *Chitko v. Janaki* (c) a widow adopted without, as appears, any direction from her husband. She contracted with the boy’s father for his entire exclusion from any proprietary right, and for his heirship to her “subject” to these “conditions” or rather limitations. They could hardly be pronounced reasonable, but on account of the poverty of the boy’s family they were upheld by the High Court. If the boy however immediately on the change in his status by adoption became heir to his adoptive father taking by inheritance an unqualified estate, the agreement must, it would seem, have been void. The widow’s contract with the boy’s father to the boy’s detriment would no more stand than such bargains of her’s with other persons.

When this ruling came under the observation of the Judicial Committee, their Lordships pronounced it a matter not unattended with difficulty. (d) In the particular case they

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(a) *Bhoobun Moyee’s case*, 10 M. I. A. at p. 311.

(b) As in the case at Steele, L. C. p. 183.

(c) 11 Bom. H. C. R. 199.

(d) *Ramasawmi v. Venkataramaiyan*, L. R. 6 I. A. at p. 208.

had at the time to deal with, their Lordships found that the bargain was one that could be and had been ratified by the adoptive son after he became of age.

It has been more emphatically dissented from by the High Court at Madras. (a) Sir C. Turner, C. J., there said—“ We are of opinion that a child taken in adoption cannot be bound by the assent of his natural father to terms imposed as a condition of the adoption, and that, like other agreements made on behalf of minors for other than necessary purposes, it would lie with the minor, when he came of age, to consent to or repudiate them. (b) This we understand to be the effect of the ruling of the Judicial Committee in *Rāmasāwmi Aiyar v. Vencataramāiyar*.” (c)

In Special Appeal No. 32 of 1871 (d) of the High Court of Bombay it was thought, however, following *Vinayak v. Govindrao*, (e) to be at least possible that a widow adopting might reserve to herself a material part of the estate.

A distinction may no doubt be taken between the widow adopting on a general authority or without authority, and one adopting under terms defined by the deceased husband. At Calcutta the husband's authority to limit at will the estate to be taken by his widow and by the son she was to

(a) In the judgment of the latter a compromise by the widow of claims set up by the members of her husband's family was upheld, though made with a view to adoption, and directly diminishing the estate. It was thought a fair arrangement in itself, and one therefore which was not affected by the subsequent adoption. (See above, p. 367.)

(b) See *Bamundoss Mookerjee v. Musst. Tarince*. 7 M. I. A. 169; *Nathajee v. Hari*, 8 Bom. H. C. R. 67 A. C. J.

(c) L. R. 6. I. A. 196; *Lakshmana Rāu v. Lakshmi Ammal*, I. L. R. 4 Mad. 160, 163.

(d) Decided 12th June 1871.

(e) Above, p. 1106 Note (b).

adopt has been fully recognized. (a) A power of adoption having been given by will to a wife, coupled with a direction that the widow should, during her life, retain all testator's property, ancestral as well as self-acquired, it was held that the widow after adopting had a life interest with remainder to the adopted son. (b)

It does not seem possible to reconcile with this last decision the opinion of the Śāstris given in the earlier case. (c) In Bombay and the other provinces subject to the law of the Mitāksharā a father's power of devise as against living sons is strictly limited, (d) and the Śāstris' opinion would substantially express the law. If the son adopted by a widow under a general power given by will takes even in Bengal otherwise than by inheritance, there is a difficulty on the decisions in conceiving how he can take at all. He may not have been born in the life of the testator, (e) he could certainly not be ascertained at the moment of his death. No gift could be made to such a person nor consequently could a bequest. (f) If however the adopted son takes by inheritance even the father's power of devise to his injury is very restricted. In *Baboo Beer Pertab Sahee v. Maharajah Rajender*

(a) The terms must, it seems, have been accepted by the boy's real father; otherwise a contention would have been raised on the ground of concealment of the limitations by the widow.

(b) *Bepin Behari Bundopadhya v. Brojo Nath Mookhopadhyaya*, I. L. R. 8 Cal. 357, following *Musst. Bhagbutti Dace v. Chowdhry Bholanath*, I. L. R. 2 I. A. 256. The latter was not a case of adoption but of a settlement by a man on his wife with the concurrence of his Kri-trima son to whom was given a remainder on the wife's death.

(c) In a case where the widow was given "absolute control" and possession during her life, Sir R. Couch, C. J., refrained from saying whether she took more than a power of management for the proposed son in adoption. *Rāmcuttee Acharjee v. Kristo Soonduree Debia*, 20 C. W. R. 472 C. R.

(d) See above, pp. 209, 216, 219.

(e) Above, p. 1055.

(f) See the *Tagore* case, I. L. R. S. I. A. 47, 67, 70; *Rāmcuttee Acharjee v. Kristo Soonduree Debia*, 20 C. W. R. 472 C. R.

*Pertab Sahee* (a) the Judicial Committee say:—"A man (with male descendants) may dispose by will of his separate and self-acquired property . . . if moveable, subject perhaps to the restriction that he cannot wholly disinherit any one of such descendants."

The husband who authorizes a widow to adopt has not sons as coparceners to interfere with his disposal of his property, and an adoption by him after such a disposal could not affect it. (b) But the case just referred to shows that a gift or devise, made after an adoption "could not prevail to any extent against the son," (c) so that if the adoption by the widow is absolutely retroactive a will in her favour being overcome by the son's survivorship cannot secure her against the ordinary risks of adoption. A *mritya patra* in a form not uncommon may be more effectual by giving her an immediate interest in the property subject to the life-use of the donor. (d)

It is obviously somewhat inconsistent with the theory of a complete continuity of ideal existence between the son adopted by a widow and the predeceased adoptive father that the widow should be able to stipulate for terms other than those of the son's taking the whole estate with all its responsibilities. (e) This theory has in many cases been applied

(a) 12 M. I. A. at p. 38; see also *Lakshman Dada Naik v. Ramchandra Dada Naik*, 1. L. R. 5 Bom. 48.

(b) *Rambhat v. Lakshman*, 1. L. R. 5 Bom. 631.

(c) Jud. Cit. at p. 637, and cases there referred to.

(d) See above, pp. 218 Note (c), 221. This form of will avoids the distinction drawn by the High Court of Madras between the gift and the will of an unseparated Hindû, unless the gift itself be deemed incomplete until separate possession of the property is given. See Coleb. Dig. Bk. II. Chap. IV. T. 56 Comm.; above, pp. 685, 695, 707 Note (c); *Villa Butten v. Yamenamma*, 8 M. H. C. R. 6.

(e) See above, p. 165. It is shown there that a Hindû inheritance is by native lawyers conceived as a *universitas*. The son takes it with all its burdens even though he should resign a part to the adoptive mother.

so as to annul the intermediate transactions of the widow, (a) but withal it is not a thorough-going theory as is seen in the case of collateral succession between the decease and the adoption. (b) The recognition of separate property however implies a right to dispose of it by the husband, and wills being allowed, he can give or bequeath to his widow as against an existing son, (c) much more it may be said as against a son to be adopted. (d) If dying sonless he makes no will, his widow takes his separate estate by inheritance, (e) and even with respect to the immoveable property, as she cannot be forced to adopt at all, it seems a necessary concession that she should be allowed to impose reasonable terms on an adoption for her own security. (f) By avoiding any disposition her deceased husband has, under the law of Bombay, made her discretion virtually his own. If he has given particular directions these must probably be regarded as conditions, without compliance with which an adoption cannot be made in so far as they are conditions precedent, (h) and which otherwise attend the adoption and govern the rights of property arising under it, so far as is consistent with the status induced by the adoption. The terms must, to satisfy in any degree the Hindû law be not grossly unfair to an infant adopted, and must be subject to control and revision by the Civil Court.

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(a) Above, pp. 101, 367; *Rajkristo Roy v. Kishoree Mohan*, 3 C. W. R. 14; MS. 1716; 2 Str. H. L. 127.

(b) See too above, pp. 94, 96.

(c) Above, pp. 207, 208, 219.

(d) See above, p. 641.

(e) Above, pp. 88, 94; Mit. Chap. II. Sec. I, p. 39.

(f) Analogy would suggest a possible reserve of one half as on a partition with her son she would take so much. See above, pp. 778, 782; Steele, L. C. 59. The Śāstris' view of the proper extent of the mother's right was the same. See pp. 366, 370.

(k) Comp. *Rangubái v. Bhagirthibái*, I. L. R. 2 Bom. 377.

Though the Hindû law, in its earlier form, strictly guarding the family estate, imposed rigorous limitations on gifts to females (a) it is inconsistent with its later development that they should not be capable of taking as large an estate as a donor is capable of bestowing. (b) The Mitāksharā's doctrine of the widow's inheritance (c) implies that she may take the whole interest of her husband. (d) The restrictions on her dealing with the immoveable property (e) show that when they were set forth the law had not yet become fully unfolded. In the present age when individual right has taken a much higher place than formerly, and a man may dispose freely even of self-acquired lands, (f) it seems to follow that he may bestow them by gift or devise on a wife or widow as well as on any one else. As regards moveables no doubt can exist. The cases referred to above, pp. 208, 293, 315, show that an interest much larger than the technical widow's estate (g) may be given to a woman, (h) and it has recently been expressly ruled (i) that a man owning separate property may devise it without limitation to his widows. The widows thus dowered might adopt a son, and the question would then arise of whether by doing so they must necessarily defeat their own estate by a retrospective operation of the adoption so as to nullify the will. The husband's gift to them of his separate property could not be defeated by his son, whether born or adopted, unless the

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(a) Above, p. 271.

(b) See above, pp. 208, 219, 293.

(c) Mit. Chap. II. Sec. I. para. 39.

(d) Above, pp. 149, 295 ss.

(e) Above, pp. 299 ss.

(f) Above, pp. 772, 812.

(g) Above, pp. 94 ss.

(h) See above, p. 777.

(i) *Mulchand v. Bai Mancha*, Bom. H. C. P. J. 1883, p. 199; S. C. I. L. R. 7 Bom. 491, following *Jeevun Punda v. Must Sona*, N. W. P. H. C. R. 1869, p. 6. The father could not disinherit his son by will under the Mitāksharā law, as in *Prosunno Coomar Ghose v. Tarracknath Sirkar*, 10 B. L. R. 267. See above, pp. 207, 208, 219, 365, 587; 2 Str. H. L. 19, 21.



son were thus reduced to indigence, (a) and as in the particular case the wishes of the husband in favour of the widows have been strongly signified, there seems to be no valid reason why they should not be at liberty to make a reasonable reserve for themselves in settling the terms of an adoption. The assumed will of the deceased in favour of adoption may be supposed to have been thus conditioned, and the act of adoption to connect itself by relation with the purpose or permission that gives it effect. (b)

Where a deed of permission or a will has explicitly set forth the terms on which the deceased wished an adoption to be made, there should, it seems, be still less difficulty in giving effect to such terms wherever they are not wholly unreasonable. In the case of simple inheritance by a widow a transaction by which she defeats the rights of a quasi-posthumous son is certainly opposed to jural theory. (c) Nor could a widow even claim a partition with her son so as to obtain an equal share. (d) Her power to make stipulations in adopting must apparently be placed on the general subordination of merely pecuniary arrangements to the will of those concerned, on her faculty to adopt or not at pleasure, and on the benefit to be secured both to her husband and to the child of her choice (e) by not making the hazards of adoption too great. As it rests thus on considerations outside a strict construction of the law, it is peculiarly a subject for the equitable jurisdiction of the Courts, the exercise of which is most strongly called for where an infant is transferred from his family of birth and deprived of the rights annexed to his position there.

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(a) Above, pp. 208, 216, 772.

(b) See Vin. Abtr. Tit. Relation.

(c) Unless it can be maintained that in making no disposition the husband has intended her to be unlimited owner even of the immoveable property. This is not admitted by the Courts. See the Section on Stridhana.

(d) See above, pp. 653, 824.

(e) An analogy may be found in the marriage settlements arranged for minors by their parents under the English law.

The older authorities, both text books and decisions, agree in a great measure with the strictness of the Śāstris' view. It is only within a short time that a relaxation is to be noticed conformable to what has long been the usage in Bombay, and now perhaps going beyond it. As usual under such circumstances the decisions have not been quite consistent. In one case no such condition, it was said, as that an adoption of a boy remaining good so long only as he was obedient to the mother was proved to have been imposed upon an adoptee at adoption, and even if it were, such a condition would be invalid. (a) In some other cases, however, such a stipulation has been held not invalid, as in the one noted below, notwithstanding the widow's acknowledgment of the adoption and Government's having acted upon it without question. (b) The Śāstri however would not allow even the adoptive son by contract to divest himself of his estate. An adoptive mother (Koli) made an agreement with her son, whereby he resigned to her the bulk of the family property. This was pronounced by the Śāstri illegal, and the adopted son, if capable, still entitled to inherit, subject to the duty of maintaining the mother. (c)

The early cases are equally restrictive of the widow's right. The adoption, it was ruled, works retrospectively, notwithstanding that the adopting widow had declared in the adoption deed that the estate was to remain with her during her life. (d) So also an attempt by a widow in adopting to reserve the estate to herself for life by a formal declaration in writing was pronounced of no avail. (e)

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(a) *Ram Surun Doss v. Musst. Pran Koer*, N. W. P. R. for 1865, Pt. 1, 293.

(b) *Th. Oomrao Singh v. Th. Mahtab Koonwar*, 4 N. W. P. R. 103A.

(c) MS. 15.

(d) *Musst. Solukhna v. Ramdoolal Pandé et al.*, 1 C. S. D. A. R. p. 324. In *Radhabai v. Damodar Krishnarao*, Bom. H. C. P. J. for 1878, p. 9, a document of somewhat doubtful import was construed as not intended to deprive an adopted son of his ordinary rights, and thus a discussion of *Chitko v. Janaki*, 11 Bom. H. C. R. 199, was avoided.

(e) *Musst. Sabitra Dacc v. Sutturjhun Sutputtec*, 2 C. S. D. A. R. 21.

The relative position of the adoptive mother and son are thus defined by Colebrooke:—"Presuming the property here spoken of as the woman's to have been what devolved upon her by the death of her husband, and not to have been her proper *strīdhana* it ceased to be her's at the moment of a valid adoption made by her of a son to her husband and herself; in the same manner as property coming into the hands of a pregnant widow, by the same means, cannot be used by her as her own after the birth of a son. An adopted child is in most respects precisely similar to a posthumous son. From the moment of the adoption taking effect, the child became heir of the widow's husband; and the widow could have no other authority but that of mother and guardian." (a) Treating the interval before adoption like a time of gestation the husband's bequests to his widow might take effect according to principles generally recognized. In the case of an intestacy recourse must be had it seems to popular usage, as a ground for an indulgence to the widow which is foreign to the system of the *Śāstras*.

It was conformable to this, that in the case above where a widow had reserved to herself a portion of property at the adoption, it was held she could sue in her own name in respect thereof. (b)

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#### A. 7.—ASSENT AS A VALUABLE CONSIDERATION.

However restricted the capacity may be for varying the rights and duties annexed to the status of an adopted son, yet the boy whom it is proposed to give in adoption, and who has reached years of discretion, may exact terms from his family of birth. His assent to be given in adoption was held to be a good consideration for an agreement on the part of his brother, whose interest was necessarily augment-

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(a) 2 Str. H. L. p. 127.

(b) *Oomalai v. Sakatmal*, S. A. No. 32 of 1871.

ed by the transaction, to give him a building site with a supply of water. (a)

An engagement to adopt and to settle property on the adopted, in consequence of which parents actually give their son to the keeping of the promisor, is a contract that can be specifically enforced. It stands on a footing similar to that of a promise serving as an inducement to marriage, and the representative of the promisor may be compelled to make good the promised settlement. The estate which had passed to the promisor's widow was held bound by the contract to which she gave full effect by transferring the property thirty years after her husband's death. (b)

Parents are not, however, allowed to annex to the gift of their son conditions in their own favour, exposing him to the risk of the adoption's being declared void. (c) The Court refused to give effect to such a contract. Nor are the sapindas, whose assent may be needed, at liberty to sell their assent as if it were a right of property. As to such a (supposed) case the Judicial Committee said—"The rights of an adopted son are not prejudiced by any unauthorized alienation by the widow which precedes the adoption which she makes; and though gifts improperly made to procure assent might be powerful evidence to show no adoption needed, they do not in themselves go to the root of the legality of an adoption." (d)

(a) S. A. 433 of 1874; *Ramkrishna Moreswar v. Shivram Dinkar*, Bom. H. C. P. J. 1875, p. 169. The elder brother executed a conveyance to the younger.

(b) *Bhala Nahana v. Parbhu Hari*, I. L. R. 2 Bom. 67.

(c) *E. K. Acharjee Chowdhry v. Hurischandra Chowdry*, 13 B. L. R. 42, App. Reference is made to Sec. 23 of the Indian Contract Act (IX. of 1872); S. C. 21 C. W. R. 381, 382; see above, p. 894 note (g).

(d) *The Collector of Madura v. Moottoo Ramalinga Sathupathy*, 12 M. I. A. 397, 443. See above, pp. 986 ss, 1005.

**B.—THE ACT OF ADOPTION—THE PERSONS WHOSE PARTICIPATION IS REQUIRED.**

**B. 1.—IN REGULAR ADOPTIONS.**

The persons who must attend at an adoption are—(1) Parents or survivors thereof on either side of the boy, or their representatives. (a) (2) The boy to be adopted. (3) The officiating priest or priests in the castes in which sacrifices are thought indispensable.

Persons who may be invited to attend at adoption, but whose non-attendance does not affect validity of adoption, are—(1) Near kinsmen. (b) (2) Neighbouring gentry. (c) (3) Visitors, standers by, who may become witnesses of adoption. (d)

**B. 1. 1.—THE PARENTS GIVING.**

“The giver and receiver should both be present at the ceremony of adoption. It should take place at the adopter’s house or other place free from impurity. The adopter must personally (not by deputy) take the child.” (e)

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(a) Sir F. Macn. Cons. H. L. p. 218; 2 Str. H. L. p. 87. Under the Roman Law “Is qui adoptat vindicat apud prætorem filium suum esse,” Gaius I. § 134: after an “in jure cessio” by the natural father. The ancient form is given in the Digest (Lib. I. Tit. VII.) the giver saying “Mancipo tibi hunc filium qui meus est,” and the receiver “Hunc ego hominem jure quirritium meum esse aio, isque mihi emptus est hoc ære æneaque libra.” Poth. Pand I. § VIII.

As usual in solemn ceremonies the personal presence of the parties was necessary. They had to make the prescribed declaration before a magistrate of high rank, whose authority then attached to the relation contracted in his presence; mere documents were ineffectual. *Ib.* An irregular adoption could be confirmed after a judicial inquiry and hearing those who opposed it. *Ib.* § XV.

(b) *Alank Manjari v. Fakir Chand*, 5 C. S. D. A. B. 356.

(c) *Sootrugun Sutputty v. Sabitra Dye*; 2 Knapp, 387; S. C. 5 C. W. R. P. C. 109.

(d) *Veerapermal Pillay v. Narrain Pillay*, 1 Str. 91.

(e) MS. 1675. See above, p. 930.

The presence of the natural or the adoptive mother, it was held, is not necessary if the fathers be present. (a) In the particular case the parties were Śūdras, but the ceremonies imply the presence only of the fathers (when living) as indispensable even amongst the higher castes. In a case where proof of gift was wanting, either by the father or the mother of the boy, it was said that a deed executed only by the adoptive father was insufficient to establish an adoption. (b)

Similarly in a case before the Judicial Committee it was laid down that the requisite declaration of gift can be made only by the parent (c) giving the boy. An instrument signed by the adopter and declaring the boy his representative is ineffectual for this purpose, (d) and is needless. A Śāstri says "When either of the parents has given a son by pouring water on his hands the gift is complete." (The gift was in the question stated as made by the father.) (e) "The parents need not consult their relatives." (f)

The corporeal gift of the boy to be adopted may be made by deputy as by a wife, or a brother of the real father, or as a deputy of a widow by her uncle when the request and assent have passed between the real and the adoptive parents. (g)

(a) *Alvar Ammaul v. Ramasawmy Naiken*, 2 M. S. D. A. R. 67.

(b) *Lakshman v. Malu bin Ganu*, Bom. H. C. P. J. 1875, p. 186.  
See above, p. 910.

(c) See above, p. 896.

(d) *Nilmadhab Das v. Bishumbhar Das*, 3 B. L. R. 27 P. C.; S. C. 13 M. I. A. 85.

(e) MS. 1677.

(f) *Ib.*

(g) *Vijiarangam v. Lakshuman*, 8 Bom. H. C. R. at p. 256-7; *Rangubai v. Bhagirthibai*, I. L. R. 2 Bom. 377; *Jamnabai v. Raychand*, I. L. R. 7 Bom. 229.

## B. 1. 2.—THE PARENTS TAKING.

“It is ordained that the husband and wife, among the Śūdras, should be present, and that they should cause a Brāhmin to make oblation to fire.” (a)

The wife, as we have seen above, Section III., may act under a delegation from her husband in giving or receiving a son in adoption. In such a case the husband's presence is of course dispensed with.

(1) Adoption by a wife of a son in her husband's lifetime ; (2) carrying on a suit on his behalf and in his name ; (3) non-denial of adoption, were held to be strong circumstantial evidence in favour of adoption with the husband's consent and with due ceremonies performed. (b)

When one of the adoptive parents has died the other may accept in adoption subject to the conditions already considered. When both are dead, as the acceptance by either parent is impossible, the adoption itself becomes impossible also. The exceptions admitted in a few cases have been considered under Sec. III. (c) The law was thus laid down by the High Court of Bombay :—“There must be not only a giving but an acceptance manifested by some overt act to constitute an adoption according to Hindū law. (d) Here there is said to have been a giving, but to whom ? to two dead persons, the only two who could have adopted a son to the man.” (e)

## B. 1. 3.—PRESENCE OF THE CHILD GIVEN.

The indispensable manual delivery and acceptance of the boy adopted (f) implies of necessity his presence at the

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(a) 2 Str. H. L. p. 130.

(b) *Tincowrie Chatterjee v. Denonath Banerjee*, W. R. 1864, p. 155.

(c) Above, p. 1012.

(d) 1 Str. H. L. 95 ; *Manu* IX. 168.

(e) Per Westropp, C. J., *Bhagvandas Tejmal v. Rajmal*, 10 Bom. H. C. R. 265.

(f) Steele, L. C. 184.

ceremony. This gives him the opportunity, should he object to the transaction, of expressing his dissent. (a)

#### B. 1. 4.—PRESENCE OF RELATIVES.

“The adopter’s kinsmen ought to be convened, but their assent is not necessary.” (b)

#### B. 2.—IN CASES OF ANOMALOUS ADOPTIONS.

In the quasi-adoptions in vogue amongst some castes of the Bombay Presidency (c) no forms appear to be used beyond those intimating assent on both sides, nor is the presence of relatives thought requisite.

In a *kritrima* adoption the consent of the party adopted is essential to the validity of it, (d) and should be expressed simultaneously with the acceptance of the adopter.

In Macnaghten, H. L. vol. II. pp. 196 ss, will be found several cases of *kritrima* adoptions. Nothing seems essential but the assent of the parties and of the boy’s parents if they are alive. (e)

#### C.—EXTERNAL CONDITIONS TO BE SATISFIED.

##### C. 1.—AS TO PUBLICITY.

To render adoption complete, there must be a public act of giving and receiving, accompanied by a performance of some religious ceremony. (f)

(a) See above, A. 3.

(b) MSS. 1634, 1677. If the doctrine of the *Samskārakaustubha*, as to the widow’s independence in adopting be taken as law for the Bombay Presidency, the presence of relatives cannot be necessary, as an intimation of a superfluous assent, see above, pp. 864, 880, 904; *Varishkha*, XV. 6.

(c) Above, p. 927.

(d) *Lachman Lall v. Mohun Lall*, 16 C. W. R. 179.

(e) *Suth. Syn. Notes* xv. xvi.

(f) *S. Siddesory Dossee v. Doorgachurn Sett*, 1 Bourke, pp. 360, 361.



“ It is enjoined that notice of an adoption should be given to the relations within the (the circle of the) Sagotr Sapindas and to the Râja, though no provision appears in case of their disapprobation, even in adoptions by widows.” (a)

This injunction bears less on the choice amongst different boys in the family than on the necessity or at least the desirableness of the countenance of all members of the family to the celebration of a religious ceremony. To show their assent and presence they ought to sign the deed when there is one. (b)

“ Intimation of an intended adoption should be given to a Mamlutdar or other Government officer of the vicinity, but the want of it does not vitiate an adoption otherwise made with due ceremony.” (c)

Publicity is not absolutely essential to validity of adoption, yet it is always sought for on such occasions. (d)

#### C. 2.—AS TO TIME.

“ A fortunate day ought to be selected for an adoption.” (e)

“ The Sankalpa or declaration of desire to adopt must be made by day. The remaining ceremonies may then take place by night. A formal acceptance is indispensable.” (f)

(a) Steele, L. C. 45. The object of the intimation to Government where its interests are concerned may be seen from the cases above, pp. 1010-11, and the references at p. 937.

(b) *Ib.* 183.

(c) MSS. 1677, 1711; *Vasishṭa*, XV. 6.

(d) *R. Vassereddi Ramanandha Baulu v. R. V. Jugganadha Baulu*, 1 M. S. D. A. Dec. 1832, p. 520; *Ranee Munmohonee v. Jainarain Bose*, C. S. D. A. R. 1857, p. 244; *Ranee Kishtomonee Debra v. Raja Anundnath Roy*, C. S. D. A. R. 1857, p. 1127.

(e) MS. 1677.

(f) MS. 1679.

## C. 3.—AS TO PLACE.

It is not a ground for setting aside an adoption that it was celebrated not at the usual place of residence of the parties, (a) though this is the proper course. (b)

Sacrifice need not take place in the house of the adopter, (c) but this is usual. (d)

## D. I.—CEREMONIES AND FORMS—CONSTITUTIVE.

## D. I. 1.—AMONGST BRĀHMANS.

(a).—*In adopting Strangers ; and generally.*

(b).—*In adopting Sagotras.*

(c).—*In adopting Adults and Boys already tonsured or initiated.*

(d).—*In adopting as a Dvayāmushydyana.*

## D. I. 1. (a).—IN ADOPTING STRANGERS ; AND GENERALLY.

The ceremonies used in adoption are either regarded as essential to constitute the relation ; as sacrificial ; as auspicious ; as authenticative ; or as simply indicating joy and generosity. Amongst the Brāhmaṇas, if the Śāstris can be taken as faithful expositors of their law, the first two classes blend into one. But the second class is of very variable extent. At pp. 218 ss of Strange's H. L. vol. II., there is a description of a very elaborate ceremonial, but at p. 87 this is cut down to a few simple particulars, the demand after invitations and notice to the authorities, the gift, the *datta homa*, followed after adoption by the upanāyana to be celebrated by the adoptive father. (e)

(a) *Bhaskar Buchajee v. Naroo Ragonath*, Bom. Sel. Rep. 25.

(b) Datt. Chand. Sec. II. 9.

(c) *Th. Oomrao Singh v. Th. Mahtab Koonwar*, 4 N. W. P. R. p. 103.

(d) Datt. Chand. Sec. II. 16 ; Datt. Mfm. V. 15, 21 ss.

(e) See above, p. 938.

Jagannâtha (a) insists on the datta homa; and on the Samskâras (b) from tonsure onwards being performed in the adoptive family. The putreshti, he thinks, may be dispensed with, and this is so in Bombay. (c)

The Vyavahâra Mayûkha (d) prescribes an elaborate ceremonial borrowed from Śaunaka, the chief elements of which are those already indicated. That it was not deemed imperative in every particular may be gathered from Steele's Law of Caste, which describes the requisite ceremonies as follows:—

“Of the numerous ceremonies enjoined in the Śâstras, the following are the most essential:—1. Prutigruhu, the formal giving away of the boy by his parents, and acceptance by the other party, with the form of Julasunkulp, or pouring water on the hands. Presents may or may not be given. 2. Mustukawugrun, (e) the placing the boy in the adopter's lap, the latter breathing on his head. 3. Hom, fire sacrifice performed by the Poorohit or others. This is said to be unnecessary in adoptions of a brother's or daughter's son, which are performed by Wakyudau, or verbal gift. Soodrus cannot perform any ceremonies requiring muntrus from the Veds (Vedokt-kurum). 4. Deepwarna, the revolution of a lamp, a ceremony at Pooja, or worship of the idol. 5. Brâhmun Bhojun, alms of food, &c., to Brâhmuns. Such of these ceremonies as require the repetition of muntrus, as the Mustukwugrun, &c., cannot be performed by a female adopter, personally; she must go through the essential form of taking the adoptee in her lap, and supply funds for Brâhmun agency in other respects. After these

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(a) Coleb. Dig. Bk. V. T. 275.

(b) A list of the Samskâras will be found in Coleb. Dig. Bk. V. TT. 133, 134, Notes, and in Steele, L. C. 23. As the latter says, they are now much neglected, Steele, L. C. 159.

(c) Steele, L. C. 43.

(d) Chap. IV. Sec. V. para. 8.

(e) See above, p. 949. The system of spelling followed by Steele differs from the one now usually followed.

ceremonies (Widhan) have been fully performed, an adoption cannot be annulled. Pending their performance, another may be chosen . . . . . they are not essential where the adoptee is of the same gotr. But in case of discovery that the boy, being of another gotr, was not adopted with those ceremonies, or that he was of another caste, the adoption is null, and the boy is to receive maintenance as a Dās or slave.” (a)

As the Śāstris insist frequently on the necessity of the rites prescribed by the Śāstra it may be pointed out that these are very simple as compared with the elaborate ritual which has been built up on them in later days. Thus Vasisṭha says:—“The adopter shall assemble his kinsmen, announce his intention to the ruler, make burnt offerings in the midst of his house, and recite the Vyāhritis.” (b)

As caste or local custom may regulate the forms of marriage (c) so it would seem may it regulate the forms of adoption. This being so, the Courts have naturally never insisted on proof of more than the minimum prescribed by the caste law. (d) What this is has been differently estimated, but that all difficulties are to be got rid of by making mere gift and acceptance sufficient for adoption in all cases is a proposition that cannot be stated with confidence against the numerous opinions of the Śāstris of the Bombay Courts. (e)

Amongst Brāhmaṇas there may be a retraction until the datta homa has been celebrated, but not afterwards, and the

(a) Steele, L. C. 45, 46.

(b) Vasisṭha XV. 6. The Vyāhritis are mystic syllables pronounced in offering the fire oblations. See Bühler *ad loc.* The ritual described by Baudhāyana is more elaborate. See Baudh. Parisishta, Pr. VII. Ad. 5; Datt. Mīm. Sec. V. 42; Datt. Chand. Sec. II. 16.

(c) *Gatha Ram Mistree v. Moohita Kochin et al*, 14 B. L. R. 298; *Rajkumar Nobodip Chundro Deb Burmun v. Rajah Bir Chundra Manikya Bahadoor*, 25 C. W. R. 404, 414. See above, p. 941.

(d) See above, pp. 921, 922.

(e) See above, pp. 922, 923.

last rule holds for all cases in which the fire sacrifice takes place. (a) The homa is thus thought essential to a complete adoption. (b) The celebration has no constitutive effect at all, until, in its essential parts, it is completed, and a person is at liberty to change his mind and put aside a boy before full performance of the ceremony. (c)

Jala Sunkalp, or the pouring of water on the hands, is deemed an essential part of the ceremony of giving a son. (d)

In all the castes in which the Śāstra ceremonies are observed at all the placing of the boy in the lap of the adopting parent is considered indispensable. (e)

Steele says (f):—"The Putreshta ceremony and the distinction of nitya and anitya adoptions are not recognized in Poona." (g)

The rule formerly announced by the Sadar Court of Bengal was that affiliation, established by sacrifice, is absolutely essential, (h) and with this the opinions of the Bombay Śāstris agree, at least as to the Brāhmaṇa caste. The following are instances :—

"The only adoption to be recognized in the Kali Yug, is the 'Datt Vidhan,' with assent of parents and due ceremonies." (i)

"No adoption is valid unless made with the prescribed ceremonies. Mere declarations by the adoptive father will

(a) Steele, L. C. 184.

(b) Above, p. 934.

(c) *Dace v. Motee*, 1 Borr. R. 75.

(d) Steele, L. C. 42.

(e) Steele, L. C. 184.

(f) Steele, L. C. 48.

(g) See below, E. 1.

(h) *Alank Manjari v. Fakir Chand*, 5 C. S. D. A. R. 356.

(i) MS. 1755.

not constitute an adoption valid. Nor will the performance of funeral ceremonies for the adoptive father by the adopted son." (a)

"Sacrifices are to be made according to the Śāstras." (b) "Adoption is a religious act. It requires a formal declaration of desire to take a son (Sankalp); a formal gift (Dān); and a ceremonious acceptance (pratigraha). There is an abbreviated form called Gāmpaksha for one *in extremis*. But in no case can the ceremonies be altogether dispensed with, even though the adopted be of the adopter's family. The contrary view of the Dattaka Darpana is rejected." (c) "A person *in extremis*" another Śāstri says, "may shorten the ceremony but cannot omit it, (d) though the Dattaka Darpana says he may in adopting a relative." (e)

Steele speaks of adoption as "sometimes made by nuncupative will at the point of death" in the Southern Maratha Country. (f) But by this he evidently means merely an adoption *in extremis* with ceremonies abridged to suit the exigency. (g)

(a) MS. 1683.

(b) MS. 1675.

(c) MS. 1714.

(d) MS. 1674.

(e) MS. 1675.

(f) Steele, L. C. 185.

(g) The reader will be reminded of the adoption by testament of Octavius by Cæsar, which however was, except in form, only the nomination of an heir, and had to be ratified by a vote of the people. This was not really an adoption; it was merely a mode of designating a successor, and preserving one's name which became common. (Maynz, Dr. R. § 328). In a true adoption under the Hindû law the adopted, except a *dvyāmusbyāyana*, takes a new name and a patronymic from his adoptive father (see *Amgava v. Rangangavda*, Bom. H. C. P. J. 1881, p. 248). the *pālaka-putra* does not, nor does the *kṛtrima* son. An

"No adoption," a Śāstri again declares, "is valid without the prescribed ceremonies. The dispensation from ceremonies in the Saṃskâr Gaṇpatti, supposing the passage genuine, extends only to daughters' and brothers' sons," (a) and another insists that, "Whatever is done contrary to the rules of the Śāstras must be considered as null and void." (b) But the objections in the case went to the eligibility of the adopted and the adopting widow's capacity.

The age of the parties has not been thought to make any difference. An adoption of a married man was said to require for its validity the performance of the due ceremonies. (c)

A man *in extremis* adopted a son without ceremonies. The adopted performed his funeral ceremonies. The Śāstri said, this, according to the Mayūkha, constituted the son only a priti-putra, not an heir. (d)

In the case of a son adopted without any rites by a man since deceased, the Śāstri, not allowing that he was already sufficiently adopted, insisted on the elder widow's competence to adopt him as the person indicated by her husband, notwithstanding the opposition of the junior widow. (e)

In one case the answer was, "The required ceremonies must be performed by the person adopting. They cannot be completed after his death so as to constitute a valid adoption." (No mention of widow.) (f) But another Śās-

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adoption by will is not allowed, only a permission to adopt, *see above*, Sub-sec. III. B. 3.

(a) MS. 1686.

(b) MS. 1672.

(c) MS. 1643. This is the strongest mark of abandonment of right, and is properly used in such a solemn transaction as a gift or sale of land. *See Mit. Chap. I. Sec. I. para. 32; 2 Str. H. L. 426.*

(d) MS. 1680.

(e) MS. 1649.

(f) MS. 1685.

tri answered that "a ceremony begun by a dying person, who does not live to complete it, may be completed by his widow." (a) She may at any rate begin *de novo*, and this seems to be generally thought necessary. Thus "a merely verbal adoption is insufficient, nor can the deficient ceremonies be supplied after the adopting father's death. But his widow may adopt anew from the beginning." (b)

Jagannātha discusses at some length (c) the question of whether besides a gift the prescribed religious ceremonies and saṃskāras performed in the adoptive family are essential to adoption. His conclusion is that "should the oblation to fire be partly omitted through inability to complete it, the adoption is sometimes good." As to the saṃskāras he accepts the passage of the Kālikā Purāṇa which Nilkanṭha questions, (d) and derives from it the rule that tonsure and the subsequent saṃskāras are at least requisite to the completion of sonship. (e) Hence there can be no adoption of a boy whose tonsure has been performed. (f) As there is no ceremonial tonsure as a saṃskāra in the lower castes (g) the obstacle it would create does not exist amongst them, (h) nor has any rite to be performed in order to complete an adoption beyond a gift and acceptance distinctly for that purpose.

Colebrooke too says—"Adopted sons being duly initiated by the adopter under his own family name become the sons of the adoptive parent. The upanāyana (thread cere-

(a) MS. 1661.

(b) MS. 1684.

(c) Coleb. Dig. Bk. V. T. 273 ss.

(d) Vyav. May. Chap. IV. Sec. V. para. 20.

(e) Coleb. Dig. Bk. V. T. 183 Comm.

(f) Coleb. Dig. Bk. V. T. 273 Comm. See 2 Str. H. L. 109.

(g) Coleb. Dig. Bk. V. T. 134, Note. There is in most a tonsure, but without the sacramental significance.

(h) Coleb. Dig. Bk. V. T. 275 Comm. *sub. fin.*



mony) . . . . must be performed in the name of the adopter's gotra." (a)

The performance of the sacred ceremonies is not competent to a woman or a man of low caste, since the utterance of the Vedic formulas is forbidden to them. (b) The difficulty is removed by a vicarious performance of these rites. "Like the consecration and dismissal of a bull, the adoption of a son may be completed by an oblation to fire performed through the intervention of a Brâhmaṇa." (c) 'The Brâhmaṇa incurs guilt, but the spiritual purpose is none the less achieved. (d)

In Madras the mere gift and acceptance as in adoption constitute adoption even amongst Brâhmaṇas. (e) Proof of the datta homam is not necessary there. The Madras High Court quoted with approval Sir T. Strange's statement:—

"There must be gift and acceptance manifested by some overt act. Beyond this, legally speaking, it does not appear that anything is absolutely necessary, for as to notice to the

(a) Coleb. in 2 Str. H. L. 111. See above, p. 938.

(b) Vyav. May. Chap. IV. Sec. V. paras. 12—15.

(c) Coleb. Dig. Bk. V. T. 275 Comm.

(d) Vyav. May. Chap. IV. Sec. V. para. 14 ; 2 Str. H. L. 89.

(e) *V. Singamma v. Ramanuja Chertu*, 4 M. H. C. R. 165. On this doctrine the Judicial Committee has observed :—"Then it has been more recently decided in the Madras High Court that even in the case of an adoption by a Brâhmini woman the ceremony is not necessary. Their Lordships intend to follow the example of the High Court in this case in not considering to what extent the Madras decision is correct, and how far the ceremonies may be omitted in the case of adoption by a Brâhmini woman. They may, however, observe that the reasoning of the Madras Court applies even *a fortiori* to Śūdras. The other Indian decisions which have been cited, and particularly those of the late Suddur Dewanny Adawlut, clearly show that the present question has long been treated as an open and vexed one by Paṇḍits as well as Judges. It was so treated in a case before their Lordships in 1872, *Sree Narain Mitter v. Sreemully Kishen Soondory Dassee*, L. R. I. A. Supp. 149, but was not then decided, the suit being dismissed upon another ground." *Indromoni Chowdhrain v. Behari Lal Mullick*, L. R. 7 I. A. 36.

Rajah and invitation to kinsmen, they are agreed not to be so, being merely intended to give greater notoriety to the thing, so as to obviate doubt regarding the right of succession, and even with regard to the sacrifice of fire, important as it may be deemed, in a spiritual point of view, it is so with regard to the Brāhmin only; according to a constant distinction in the texts and glosses, upon matters of ritual observance, between those who keep consecrated and holy fire, and those who do not keep such fires, *i. e.* between Brāhmins and the other classes, it being by the former only that the datta homam with holy texts from the Veda can properly be performed, as was held in the case of the Rajah of Nobkissen by the Supreme Court at Bengal. . .” (a)

Even in Bombay and amongst the classes who imitate the Brāhmaṇas in their ceremonies proof of the homa has not in all cases been thought essential (b) by the Courts.

In one case it seems to have been held that the religious ceremonies might be dispensed with even in the case of Brāhmaṇas, (c) but no other instance seems to have occurred in Bombay as a decision of a superior Court.

In a single instance a Śāstri pronounced an adoption without sacrifice valid for a Brāhmaṇa. An adoption publicly made by a Brāhmaṇa without the homa was, he said, valid on the authority of the Logakshi Bhāskar. (d)

#### D. 1. 1.—CEREMONIES AND FORMS.

##### (b). IN ADOPTING SAGOTRAS.

The homa sacrifice or burnt offering deemed religiously indispensable in other cases is by custom pronounced unnecessary in the adoption of a brother's or daughter's son

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(a) *V. Singamma et al v. Ramanuja Charlu*, 4 Mad. H. C. R. p. 167.

(b) *Craśtnarao v. Raghunath*, Perry, O. C. 150.

(c) *Jagannatha v. Radhabai*, S. A. 165 of 1865.

(d) MS. 1688. See above, p. 922. The authority is not generally admitted.

(or a younger brother.) (a) In these cases the mere verbal gift and acceptance are said to suffice. (b) As a daughter's son can be adopted only by a Śūdra, and no Śūdra can pronounce a mantra from the Veda, (c) the homa must in strictness be dispensed with in his case, though a vicarious offering and recitation by a Brāhmaṇa may according to the Vyav. May. Chap. IV. Sec. V. para. 13, and by custom answer the purpose. (d) In the case of a brother's son there is no need for a discharge from the gotra of birth and an admission to that of adoption, as both are the same, so that the main purpose of the fire sacrifice not existing, the sacrifice itself becomes needless. (e)

The adoption of a nephew by word of mouth without burnt sacrifice is valid. (f) The Śāstri, however, said in another case: "The prescribed forms cannot be dispensed with even in the case of the adoption of a member of the adopter's family." (g) But again, as in the following case, the ceremonies may be excused:—"An uncle must perform the ceremony even to adopt his nephew. But if he has accepted a gift of the nephew and performed his munj the boy is thus affiliated without the (regular) ceremonies." (h)

(a) Steele, L. C. 46; Comp. Coteb. Dig. Bk. V. T. 275 Comm.

(b) See above, p. 930.

(c) Datt. Mīm. Sec. I. 26.

(d) Comp. Datt. Mīm. Sec. I. 27.

(e) 2 Str. H. L. 89, 104, 107, 123, 220.

(f) *Huabatrao Mankur v. Govindrao Mankur*, 2 Borr. 83, 95. Yama says:—"It is not expressly required that burnt sacrifice and other ceremonies should be performed on adopting the son of a daughter or of a brother, for it is accomplished in those cases by word of mouth alone." (Wak Dannu, a verbal gift.)

(g) MS. 1673. The Śāstri is supported by this that the Smṛitis which contemplate adoption from within the gotra still prescribe the homa sacrifice. See *ex. gr.* Vasishṭha XV.

(h) MS. 1690.

In Bengal the adoption of a kinsman may be made by verbal declaration, in presence of witnesses, but without any religious ceremony. (a)

#### D. 1. 1.—CEREMONIES AND FORMS—CONSTITUTIVE.

##### (c)—IN ADOPTING AFTER TONSURE.

It has been seen (b) that in the case of an adult the gift by his parents is as indispensable as in the case of a child. (c) The formal acceptance is equally indispensable, though the placing of an adult son in the lap of the acceptor (d) may not be regarded as essential. Where burnt offerings are requisite they are not less, but if possible more, necessary (e) in the case of one who, by the successive saṃskāras has become more firmly knitted to his family of birth and its sacra. (f) If adoption is at all regarded by a caste as involving a change of religious dedication it is not easy to conceive how it can take place when the saṃskāras have been completed even in the case of a man of one of the lower castes ; (g) but where the adoption is within the same gotra or quasi-gotra, no change of invocation is required, and the formal transfer should suffice.

In the case of untonsured children (h) mere irregularities in forms used in adopting are said to be cured (i) by means of the performance of the sacrifices and saṃskāras by the adoptive father. (j) The following is an instance :—

(a) *Kullean Singh v. Kripa Singh*, 1 C. S. D. A. R. 9.

(b) See p. 930.

(c) See pp. 910, 930.

(d) Steele, L. C. 184.

(e) P. 909.

(f) See above, p. 898.

(g) *i. e.* not twice-born. See above, p. 921 note (h).

(h) See Datt. Mim. Sec. IV. 33.

(i) Comp. p. 909.

(j) See Datt. Mim. Sec. IV. 69.

“When a man has received a son in adoption, whether regularly or not, and has performed sacrifices for him as included in the adoptive father’s gotra, he must be recognized as an adopted son. The adoption is not affected by the natural father’s subsequently performing the boy’s munj.” (a)

Sacrifice to fire will undo the effects of tonsure in the natural family. (b)

#### D. 1. 1.—CEREMONIES AND FORMS—CONSTITUTIVE.

##### (d)—IN THE CASE OF A DVYÂMUSHYÂYANA.

The ceremonial in the adoption of a son as a dvymushyâyana does not differ from that of the ordinary adoption except by the variance in the formula of gift. “He shall belong to us both.” (c)

#### D. 1—CEREMONIES AND FORMS—CONSTITUTIVE.

##### D. 1. 2—AMONGST THE LOWER CASTES.

The sacrifice of fire is important with regard to Brâhmanas only. (d)

(a) MS. 1677. See Coleb. Dig. Bk. V. T. 183 Comm.; Datt. Mim. Sec. IV. 33 ss.

(b) *Sy Joymony Dossee v. Sy Sybosoondry Dossee*, 1 Fult. 75. See Datt. Mim. Sec. IV. 51, 52. The author insists on a restriction to five years of age—not observed in Bombay—in order that the boy’s investiture may take place in the adoptive family. The Datt. Chand. extends the age to eight years, Sec. II. 23, 27, 30. This authority also insists on investiture’s not having taken place as a condition of fitness not apparently to be replaced by any ceremonies. In the case of a Śûdra marriage there is the same obstacle as investiture in the case of a twice-born. (*Ib.* para. 32.)

(c) Vyav. May. Chap. IV. Sec. V. para. 21.

(d) *Nobkissen Raja’s Case*, 1 Str. H. L. 96; *Th. Oomrao Singh v. Th. Mahtab Koomwar*, 4 N. W. P. R. p. 103. The needlessness of the datta-homam ceremony amongst Śûdras is placed by Ellis on the ground of their having no gotra (in the stricter sense). See above, pp. 929, 935. The transfer from the care of one to another set of tutela-

"It is held that, if a lad be adopted into a family, even where it is not the custom to perform homam (sacrifice of adoption), he cannot be turned out of it at will." (a)

"It has been held that, in the case of Śūdras, no ceremonies, except the giving and taking of the child, are necessary to an adoption." "The giving and taking in such an adoption ought to take place by the father handing over the child to the adoptive mother, the latter intimating her acceptance of the child in adoption." (b)

"As the Śāstras do not recognize Kshatriyas as existing in the Kali age, those who call themselves so should follow the ceremonies prescribed for Śūdras. (c)

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ry deities being impossible, the rite by which it is consummated is superfluous. See above, pp. 920—927. It is plain that the central idea of adoption according to the Brāhmanical conception must be entirely wanting in the case of Śūdras. The indigenous natural adoption of the latter has been wrought into a kind of harmony with the former only by the accommodations shown in the preceding pages. Śrāddhas are now looked on as appropriate to nearly all castes, See above, p. 922.

(a) 2 Str. H. L. p. 126. The following case rules only that no other ceremonies are necessary in Bengal: "It is admitted that whatever may be the force of the words 'so forth' in the case of Brāhmins, or members of the other superior classes, the only religious ceremony that is essential to an adoption by a Śūdra is the *datta homam*, or burnt sacrifice, which it is said he, though as incompetent to perform that for himself as he is to repeat the prescribed texts of the Vedas, may perform by the intervention of a Brāhmin priest." *Indromoni Chowdhraïn v. Behari Lall Mullick*, L. R. 7 I. A. 35.

(b) *Shoshinath Ghose et al v. Krishna Sunderi Dasi*, I. L. R. 6 Calc. P. C. 381.

(c) MS. 1675. . . . "The word *Dvijāte* (twice-born) which in former ages included Brāhmins, Kshatriyas, and Vaiśyas, in the present is generally understood to be confined to Brāhmins, these only performing the *upanāyanam*, or ceremony of tying on the sa-critical cord; whence the second birth, with the texts of the Veda." 2 Str. H. L. p. 149; *ib.* 263. Pure Kshatriyas and Vaiśyas are not now recognized, Steele L. C. 89, 90. In 2 Str. H. L. 263, Ellis gives an instance of a considerable conversion of Lingāyats who thereon

“An oral adoption is effected by the ceremony of giving and accepting.” (a)

An overt act of adoption is sufficient to prove an adoption, unaccompanied by religious ceremonies. But evidence of the giving and receiving is indispensable, and is easily procured where there has really been an adoption in a family of any local consequence. (b)

“The Śāstras give no rules of adoption applicable to Lingāyats. If the caste rules prescribe any particular ceremonies, these should be observed.” (c)

But even of a Śimpi it was said: “No one (not even a brother’s grandson) can be adopted without the ceremony of homa or burnt offering.” (d) The Śāstri must, in this case, be considered to have stated the law too stringently.

A dying widow put sugar in the mouth of a child of one of her relatives and called him her son. The Śāstri said there was nothing in the Śāstras to give validity to this as an adoption. (e)

“The Śūdras cannot recite the Vedic texts, but they can adopt, confining themselves to the ceremonies proper to their caste.” (f)

assumed the sacred thread as Vaiśyas. Such cases are not very uncommon, and they justify the distrust with which the Brāhmanas look on pretensions to the twice-born caste rank.

(a) MS. 1655. (Śūdras.)

(b) *Premji Dayal v. Collector of Surat*, R. A. 54 of 1870; Bom. H. C. P. J. for 1873, No. 12.

(c) MS. 1677.

(d) MS. 1689. The Śimpi ranks as an Atiśūdra, i. e. below the recognized Śūdra. See Steele, L. C. 107.

(e) MS. 1687.

(f) MS. 1675. See above, p. 1130 (d).

In a Sûdra adoption the ceremony of "pootresh to jog" is not essential, yet it is conformable to law and religion ; and if performed, is the best proof of real intention of adoption. (a) It has been pronounced essential when the adoption is in the dattaka form. (b) But it is not necessary in Bombay. (c)

Among the Sikhs proof of datta homam does not seem to be essential. (d)

Whether in Bengal religious ceremonies are generally necessary to make valid adoptions among Sûdras might seem uncertain. (e) The performance of the datta homam was once held essential there to the adoption even of a Sûdra, (f) but this was afterwards overruled (g) by a Full Bench, no further ceremony, it was said, being necessary than gift and acceptance. (h)

#### D. 1.—CEREMONIES AND FORMS—CONSTITUTIVE.

##### D. 1. 3.— SUBSIDIARY FORMS.

Amongst these are the expressions of assent by the relatives and the representative of the Government. Additional prayers and sacrifices fall into the same class. But the chief subsidiary form is that of reducing the declaration of trans-

(a) *Hurrosoondree Dassee v. Chundermohinee Dassee*, Sev. 938.

(b) *Luchmun Lall v. Mohun Lall*, 16 C. W. R. 179.

(c) See above, pp. 1135-36.

(d) *Deo dem Kissen Chundershaw v. Baidam Bebee*, East's Notes, Case 14.

(e) *Sri Narayan Mitter v. Sy Krishna Soonduri Dossee*, 11 C. W. R. 196 ; S. C. 2 B. L. R. 279 A. C. J ; *Nittianand Ghose v. Kishen Dyal Ghose*, 7 B. L. R. 1. ; S. C. 15 C. W. R. 300.

(f) *Bhairabnath Sye v. Maheschandra Bhaduri*, 4 B. L. R. 162 A. C. ; S. C. 13 C. W. R. 169.

(g) *Bchari Lal Mullick v. Indramani Chowdhraïn*, 13 B. L. R. 401 ; S. C. 21 C. W. R. 285.

(h) *Nittianand Ghose v. Krishna Dyal Ghose*, 7 B. L. R. 1.



fer to a formal instrument signed by the parents and attested by the relatives and other principal persons present. Where any particular settlement is made, varying in any way the rights and obligations of the parties within the limits allowed by their law, a written instrument should be deemed indispensable. For the adoption itself no writing is necessary; but in every case it may probably be useful to authenticate the transaction. Macnaghten says—

“There is no law requiring the execution of a written instrument on the occasion of receiving a boy in adoption, though the practice of resorting to writing is prevalent.” (a) And the Judicial Committee ruled that neither registration of adoption, nor any written evidence, is essential to validity of adoption. (b)

No stereotyped form of adoption is requisite; absence of registration or of a stamp may raise suspicion but cannot invalidate the deed. (c) The language of the Privy Council in the case lately quoted is important. “According to the Hindû law, neither registration of the act of adoption, nor any written evidence of that act, having been completed, is essential to its validity. It is to be lamented, that an irrevocable act, which defeats the just expectations of the relations of deceased persons, may, at any distance of time after it is supposed to have been done, be proved by verbal testimony. It would certainly contribute much to the security of property and the happiness of Hindû families, if, in a country where the religious obligation of an oath is unfortunately so little felt, and documents are so readily fabricated, adoptions and all other important acts were required to be perfected in the presence of some magistrate and recorded in some Court.”

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(a) 2 Macn. H. L. 176.

(b) *Sootrugun Sutputty v. Sabitra Dye*, 2 Knapp, p. 287; *Pritima Soonduree v Anund Coomar*, 6 C. W. R. 133; 2 Wyman, 135.

(c) *Pritima Soonduree v. Anund Coomar*, 6 C. W. R. 133.

“ But although neither written acknowledgments, nor the performance of any religious ceremonial, are essential to the validity of adoptions, such acknowledgments are usually given, and such ceremonies observed, and notices given of the times when adoptions are to take place, in all families of distinction, as those of zemindars or opulent Brāhmans, that wherever these have been omitted, it behoves this Court to regard with extreme suspicion the proof offered in support of an adoption. I would say, that in no case should the rights of wives and daughters be transferred to strangers, or more remote relations, unless the proof of adoption, by which that transfer is effected, be proved by evidence free from all suspicion of fraud, and so consistent and probable as to give no occasion for doubt of its truth.” (a)

The execution of deeds, without actual gift and acceptance, is not sufficient (b) to constitute an adoption. A mere constructive giving and receiving cannot be relied on. A suit to set aside deeds giving and receiving in adoption, where no son was given according to the deeds, is not maintainable. (c) [For without gift and acceptance there can be no valid adoption, and cancellation does not avail anything.] Where a deed was executed, signifying an intention, if a certain approval was obtained, to take a boy in adoption, and the boy was not given or accepted, the adoption was held incomplete, the deed being provisional and intended to be acted upon during the life of the executing party, who had not capacity to make a testamentary disposition. (d)

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(a) Lord Wynford in *Sootrugun Sulputty v. Sabitra Dye*, Knapp's P. C. p. 290, 291.

(b) *Siddesory Dossee v. Doorga Churn Sett*, 2 I. J. N. S. 22; *Sri Narayan Mitter v. Sy Krishna Sundari Dasi*, 11 C. W. R. 196; S. C. 2 B. L. R. 279 A. C. J.

(c) *Sri Narayan Mitter v. Sy Krishna Sundari Dasi*, 11 C. W. R. 196; S. C. 2 B. L. R. 279 A. C. J.

(d) *B. Banee Pershad v. M. Syad Abdool Hye*, 25 C. W. R. 192.

An adoption of a daughter's son was held invalid for want of a writing or deed of adoption, and for want of proof that religious ceremonies were performed. (a) This decision cannot be considered very satisfactory. If the parties were Brāhmaṇas the adoption of a daughter's son was invalid. If they were Śūdras religious formalities were unnecessary.

#### D. 1.—CEREMONIES AND FORMS—CONSTITUTIVE.

##### D. 1. 4.—INFORMALITIES.

According to the Poona castes—"Any irregularity or defective performance in the adoption of customary rule, . . . . . is a cause of its annulment." (b)

It is not easy to gather from the cases what informalities are to be regarded as vitiating an adoption and what do not affect its validity. The chief authorities tend, it will be seen, to the sufficiency of a gift and acceptance authenticated by *some* religious rites, especially the homa. (c) The others cannot be regarded as so important that the omission of some of them is a cause even for grave suspicion. Colebrooke says—"An inadvertent omission of an unessential part as sacrifice does not vitiate adoption. (d) . . . . . "The essence of the adoption of a son given . . . is the gift on the one side, and the formal acceptance of the child as a son on the other . . . the rest of the ceremonies prescribed . . . may be completed in pursuance of the adopter's intention, by others for him, if he should die prematurely. The unintentioned omission of some part of them by the adopter would hardly invalidate the adoption; though the wilful omission of the whole by him

(a) *Bacc Gunga v. Bacc Sheekoovur*, Bom. Sel. Rep. 80.

(b) *Steele*, L. C. App. p. 388.

(c) *See* above, pp. 935 ss. The Śāstris, as we have seen, are more exacting.

(d) 2 Str. H. L. 126.

might have that effect, since the performance of the ceremony of tonsure, and other rites, in the family of the adopter, is indispensable to the completion of the adoption." (a)

"However defective the ceremony," Ellis said, "and however small in consequence the spiritual benefit, the act of adoption cannot be set aside on any account whatever; *a fortiori*, not on account of any informality." (b) And Colebrooke on the same case, "The adoption being complete, it cannot be annulled. An adopted son may be disinherited for like reasons as the legitimate son (Mitaksharâ on Inheritance, Chap. II. Sec. X.), but he cannot forfeit the relation of son." (c) "The meaning of that passage is, that a lawful adoption, actually made, is not to be set aside for some informality which may have attended it; not that an unlawful adoption shall be maintained." (d)

In one case Sir E. Perry expressed himself thus:—

"Wassadeo Wittaji expressed a strong desire in his will that a son should be adopted to him; and as we find it indisputably proved that the widow did in fact solemnly adopt the infant plaintiff in the presence of a great many Brâhmîns, Purvoes, and relatives; that all the more important ceremonies were observed, the Ganputty Pûjâ, or worship of the god Ganput, the Pûjâ Wachan, or reverence to the Ganges, the Hom or sacrifice of fire,—we were inclined to think that even if other observances had been disregarded, still, the essence of the ceremony having been adhered to, the adoption was good for every legal purpose." (e)

(a) Colebrooke in 2 Str. H. L. p. 155.

(b) Ellis in 2 Str. H. L. p. 126.

(c) Colebrooke in 2 Str. H. L. p. 126.

(d) 2 Str. H. L. pp. 178, 179.

(e) *Crastnarao Wassadewji v. Raghunath Harichandarji et al*, Perry's Or. Cases, pp. 150, 151.

The non-observance, however, of the ceremonies, other than those held to be indispensable, though it does not render an adoption invalid, yet will afford presumptive evidence against the adoption where the situation in life of parties renders such forms usual. (a)

In Madras "if the performance of the datta homam be established, the adoption is established; but, if otherwise, the converse does not hold good. Further evidence may be adduced. In no case can the omission of the ceremony affect an adoption in other respects valid. If not performed, when the adoption is from another gotram, it would seem, from analogy, that the son so adopted must be anitya datta." (b)

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#### D. 2.—CEREMONIES AND FORMS—COLLATERAL.

##### 2. 1.—INDUCING GOOD FORTUNE.

"Donations are to be given to Brāhman mendicants." (c)

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##### D. 2. 2.—INDICATING JOY AND GENEROSITY.

"Some clothes and ornaments are to be presented to the adopted child." (d)

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##### D. 2. 3.—AUTHENTICATIVE.

The instruments described above under Sub-Section D. 1. 3 might properly be placed under this head also. But in some few castes they are thought essential, and in all they serve to make the declaration explicit. A reference here seems enough. The assembly of relations and neighbours is another and the usual means of record of the transaction.

"At an adoption a festival is held, to which are invited relations, friends, and leading men of the caste. Presents

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(a) *Sutrugun Sutputty v. Sabitra Dye*, 2 Knapp, 287; 1 C. S. D. A. R. 15.

(b) 2 Str. H. L. p. 220.

(c) MS. 1675.

(d) MS. 1675.

are distributed among the head men of the caste, village officers, relations and guests. The fact of distribution of sugar, cocoanut, and pân is evidence of an adoption." (a)

## E. VARIATIONS.—IN THE CASE OF QUASI-ADOPTIONS.

### E. 1.—DISAPPROVED ADOPTIONS.

A distinction was taken by a Paṇḍit in Madras between a permanent (nitya) adoption accomplished by a ceremony including the homam and a temporary (anitya) one, where the homam had been dispensed with. In the latter case it was said the son of the man thus adopted might be initiated in either gotra. Ellis recognizes this, (b) but the anitya adoption is not allowed in Bombay. The boy is wholly adopted or not at all.

The kṛita son, it is said, must be received from the hand of the father or of the mother as his agent. (c) This mode of adoption is no longer allowed, (d) except in the modified form used by ascetics, (e) who buy children to maintain a spiritual succession. (f) A Śâstri thought the ordinary forms should be used. "Śûdras in adopting (and Gosâvis are Śûdras) are to omit the recitations from the Vedas." (g)

"In the kindred case of the kṛitrima, or son made, the mode of adoption as practised in those of our provinces in which it prevails is very simple, being completed by the declaration and consent of the parties without any religious ceremonies." The Datt. Mîm. however makes the religious rites indispensable alike to the Dattaka and Kṛitrima, and

(a) Steele, L. C. p. 184, "Pân" is the betel-leaf.

(b) 2 Str. H. L. 121, 123.

(c) Coleb. Dig. Bk. V. T. 281 ss; see 2 Str. H. L. 138, 143.

(d) Above, p. 894, Note (g).

(e) 2 Str. H. L. 133.

(f) See above, pp. 550 ss.

(g) MS. 1678. See above, pp. 933, 934.

hence Colebrooke says they must, when the *kṛita* form is allowed, be essential to that also. (a)

As to Bombay, adoption after payment of a price is not, it is said, recognized there in the *Kali yuga*, (b) but one or two of the Gujarâth castes adhere to the practice, and "with some castes in Madras the mode of adoption is uniformly by purchase." (c) Amongst them it may be allowed on the ground of class usage, which must also govern the ceremonies in any particular instance. (d) The *kṛita* adoption [*i. e.* by purchase] is really obsolete, unless on the ground of local usage (e) even in Madras.

#### VARIATIONS IN THE CASE OF QUASI-ADOPTIONS.

##### E. 2.—CONNEXIONS RESEMBLING ADOPTION.

In the case of a *pâlak putra* a mere assent of the parties openly expressed is all that custom requires.

In one case, noted above, (f) the *Śâstri* was of opinion that by mere nurture and recognition an *Agarvâlî* (g) had given to a boy the status of an heir. But this, as shown in the remark is opposed to the general Hindû law; it could be sustained only on the ground of caste custom.

Recognition of dancing girls as daughters suffices, it was said, to constitute adoption without any formal act. (h)

(a) Coleb. 2 Str. H. L. 155. The consent of the person adopted by the *kṛitima* form is indispensable. See above, p. 1016.

(b) *Eshan Kishor Acharjee v. Harischandra*, 13 B. L. R. App. 42; S. C. 21 C. W. R. 331; see 2 Str. H. L. 156.

(c) 2 Str. H. L. 148.

(d) Above, p. 2.

(e) *Gooroovunmal v. Mooncasamy*, 1 Str. H. L. 102, 103; 1 Str. Notes of Cases, p. 61.

The Roman adoption *per æs et libram* approached most nearly amongst the Hindû forms, probably, to the *kṛita*. There was a real or fictitious sale by the *pater-familias* of the person adopted.

(f) P. 373, Q. 18.

(g) See Steele, L. C. 97.

(h) *Vencatachellum v. Venkatasamy*, M. S. D. A. Dec. 1856, p. 65.

## SECTION VII.

### CONSEQUENCES OF ADOPTION.

#### I.—GOVERNED BY THE ORDINARY LAW.

##### I. 1.—PERFECT ADOPTION.

##### A.—GENERAL CONSEQUENCES.

##### A. 1.—CHANGE OF STATUS.

“Adoption causes an immediate change of status.” (a)

“The relationship of the son to his family of birth ceases.” (b)

“The theory of adoption depends upon the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line, and his complete substitution into the adopter's family as if he were born in it.” (c) An adopted son ceases to be the son of his natural parents, and becomes the son of the adoptive father to all purposes. (d)

(a) MS. 1671. “Adoption alone constitutes affiliation; but the ceremony of tonsure performed by the family, to which he originally belonged, renders it essentially invalid . . . . But this affiliation once effected, is not cancelled by his naming his former family in performing a sacrifice, or in consecrating a pool. Birth caused by male seed and uterine blood is one ground of filiation, the second birth, by investiture and other ceremonies, is equally a ground of filiation, by whomsoever performed. When he who has procreated a son gives him to another, and that child is born again by the rites of initiation, then his relation to the giver ceases, and a relation to the adopter commences: this birth cannot afterwards become null by his erroneously reverting to his original family.” (Coleb. Dig. Bk V. T. 183 Comm.)

(b) MS. 1760.

(c) *Uma Sankar Moitro v. Kali Komul Mezumdar et al*, I. L. R. 6 Calc. 259.

(d) *Gopegmohun Thakoor v. Sebun Koer et al*, East's Notes, Case 61; 2 Morl. Dig. p. 105; *Appaniengar v. Alemaloo Ammal*, M. S.



The adopted takes generally the rights and the duties of a begotten son. (a)

"If it is once conceded that the adoption is valid, all the legal consequences attached to it must follow as a matter of course." (b)

It follows that "only one adopted son can subsist at one time." (c)

When a Hindû gives his son in adoption, his power, it was said, more resembles that of a proprietor than that of guardian. (d) This is true in so far as a guardian could not possibly give away his ward. The father has power to annihilate his own paternal right, and does so by giving in adoption.

The chief purpose, and originally it seems the only purpose, of adoption having been the maintenance of the adoptive father's sacra, (e) it is said "A son given is therefore the

D. A. R. for 1858, p. 5; *Narasammâl v. Balarâmâchârlu*, 1 M. H. C. R. p. 420. The statement must be slightly qualified. See below.

(a) Above, p. 367. "Adoption is as if the adoptive father had begotten the son." Per Willes, J, in the *Tagore Case*, I. L. R. I. A. Supp. pp. 47, 67.

(b) Per D. Mitter, J., in *N. Rajendro N. Lahoree v. Saroda Soonduree Dabee*, 15 C. W. R. 548.

(c) Steele, L. C. p. 45.

(d) *Chitko v. Janaki*, 11 Bom. H. C. R. 199. He is bound, however, to guard the interests of his son (see above, Sec. VI. A 6). Under the Roman law down to a late time a child could be disposed of like goods, and therefore let on hire or pawned. This was forbidden except in cases of extreme necessity, such as justify a sale under the Hindû law, and at last wholly prohibited by Justinian. See Maynz, Dr. Rom. Sec. 410; Vyav. May. Chap. IV. Sec. I. paras. 11, 12, Sec. IV. para. 41, Sec. V. para. 2, Chap. IX. paras. 2, 3, compared with Manu IX. 174, Vasishṭha XV. 2; XVII. 31, 32. Āpastamba forbids the sale, Pr. II. Pat. 6, Kh. 13, para. 11. So too does Yājñavalkya. Kātyāyana allows it in extreme necessity, Coleb. Dig. Bk. II. Chap. IV. TT. 6, 7, 16. Above, p. 894.

(e) Above, pp. 872 ss.

child, not of his adoptive mother, but of his adoptive father only." (a) The interest of the adoptive mother and her ancestors in the adopted son and the religious duties to be performed by him is an idea of later growth and less definitely settled. It may now be accepted however that "if a son be adopted by the husband, the wife has a secondary claim to that child, because property is common to the married pair, (b) and the line of the maternal grandfather is the ancestry of the adopter's father-in-law." (c)

### I. 1. A. 2.—CHANGE OF SACRA.

The change of sacra, that is of connexion with the manes of ancestors, of obligations to them, and of the peculiar family rites and formulas is the most important element of adoption to the orthodox Hindû. The supreme importance of initiation as completing this connexion is much dwelt on in the Śāstras, (d) and the due celebration of śrāddhas occupies the chief place in the religious books. (e) For their effectual performance the son adopted must be qualified by a complete reception into the family. (f)

(a) Coleb. Dig. Bk. V. T. 273 Comm. See H. H. Wilson, Works, vol. V. p. 57.

(b) See above, p. 92; Coleb. Dig. Bk. II. Chap. IV. T. 18.

(c) Coleb. Dig. Bk. V. Chap. IV. T. 275 Comm. The expression is in English very awkward. The son being commanded to honour his maternal grandfather, this is an intepretation of the command for the case of an adopted son. In the event of an adoption during a son's exclusion from caste, followed by the son's re-admission, the position of the adopted son on a reconciliation between the one he has replaced and his father seems not to have been settled. (See above, pp. 905, 906.) The adopted son would probably be reduced to a share of one-fourth.

(d) See above, pp. 872, 900 ss.

(e) Comp. Vyav. May. Chap. IV. Sec. VII. 29 ss.

(f) See Vasishṭha II. 4, 5; XI. 49; H. H. Wilson, Works, vol. V. p. 45, compared with the statement above, p. 994.

"Śrāddha ceremonies are performed on the anniversary of a father's death. The Paksha ceremonies are performed subsequent to the first

When a son has been adopted, and has gone through the saṃskāras, it must be inferred that, as in the case of a son by birth, a deliverance from *put* of the ancestors by adoption has by this fulfilment of duty been effected. (a) In the event therefore of his death, no further adoption is necessary for the fulfilment of religious duty.

The ceremonial impurity arising from births and deaths in the family of his birth no longer affects the person who has been transferred to another by adoption. He presents no oblations to his natural father and his ancestors, but "distinct oblations" to the adopted father and his ancestors. (b)

### I. 1. A. 3.—ADOPTION TRANSFERS THE OFFSPRING.

"A man having a son is adopted and then dies. His son takes his place as heir in the adoptive family." (c)

"This is so though another son is born (to the adopted) after the adoption." (d)

"The son born before his father's adoption not only is heir to the adoptive grandfather's estate, but is answerable for a debt of the grandfather admitted by his father." (e)

By Act XXI. of 1870, § 6, the word "son" in the Indian Succession Act (X. of 1865) is in many places made to

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year after a father's death, at some time during the month Bahādra-pad. There are also daily and monthly offerings for the benefit of a father and ancestors deceased." Steele, L. C. p. 26 n; Coleb. Dig. Bk. V. T. 399 note, enumerates sixteen Śrāddhas that must be performed for a Brāhmaṇa recently deceased. See Coleb. Dig. Bk. V. T. 276 Comm.; above, pp. 444, 447, 880, 896; and Comp. Ortolan, Instituts, Tom. II. §§ 129, 132, on the corresponding institution at Rome.

(a) Coleb. Dig. Bk. IV. T. 155 Comm.; above, p. 872.

(b) Datt. Chand. IV. 2.

(c) MSS. 1730, 1742.

(d) MS. 1738.

(e) MS. 1737. See above, p. 80.

extend to an adopted son, and "grandson" to a grandson by adoption. The following sections of the Succession Act must be so construed, § 62, 63, 92, 96, 98, 99, 100, 101, 102, 103, 182.

#### I. 1. A. 4.—ADOPTION IN THE ADOPTIVE FATHER'S LIFE IS PROSPECTIVE.

The general effect of adoption is as if a son had been born, though the rights thus acquired are subject to total (a) or partial defeasance by the birth of a real son. Thus, it has been said, it is competent to an adopted son to claim a partition of ancestral property (b) where a begotten son could do so. The adoption is in this sense tantamount to the birth of a son to the adopter; (c) consequently there cannot be two adopted sons. (d) But neither does the adoption any more than the birth of a son affect bygone transactions of the father which were valid when entered into. (e) An adoption during the pendency of a suit affecting the ancestral property, does not affect a previously completed gift by the adoptive father though accompanied by a trust in his own favour. (f)

#### I. 1. A. 5.—ADOPTION AFTER THE ADOPTIVE FATHER'S DEATH IS RETROSPECTIVE.

"As soon as a son is adopted by a widow he succeeds to her husband's estate. Her independent rights and those of

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(a) As in the case of a Rāj impartible. The right to maintenance must be excepted.

(b) MS. 1731.

(c) *Heera Singh v. Burzar Singh*, 1 Agra H. C. R. p. 256.

(d) *Steele*, L. C. App. p. 393; above, p. 916.

(e) Even in the case of a partition the right of an after-born son to share in divided property depends on whether he was begotten at the time of the partition (*Yekeyamian v. Agniswarian et al*, 4 Mad. H. C. R. 307, 310). If begotten before it, he would take a share; if after it, he would share only with his father in the latter's share.

(f) *Rambhat v. Lakshman Chintaman Mayalay*, I. L. R. 5 Bom. at p. 635.

her mother-in-law forthwith cease." (a) The widow succeeds to her separated husband, but her estate is subject to immediate defeasance on her adopting a son. Her right is reduced to a legal claim to maintenance.

Adoption works retrospectively and relates back to the death of the husband of the adoptive mother, invalidating a gift or sale, unless it was made for preservation of the estate from foreclosure under a prior conditional sale by the husband, (b) or other necessary purpose. In the following cases the retroactive effect is expressed most strongly:—

"In *Ranee Kishenmune v. Rajah Oodwunt Singh* (c) it was held that according to the Hindû law, a boy adopted by a widow, with the permission of her late husband, has all the rights of a posthumous son, so that a sale by her, to his prejudice, of her late husband's property, even before the adoption, will not be valid, unless made under circumstances of inevitable necessity." (d)

"In *Bamundoss Mookerjee v. Musst. Tarinee* (e) (in which the decision of the Bengal Sadr Diváni Adálat was adopted without qualification by the Privy Council) the Judges, referring to that case, said:—'In that case the son, when adopted, became the undoubted heir, and it was of course the correct doctrine that no sale made by a widow, who possesses only a very restricted life-interest in the estate, could have been good against any ultimate heir, whether an adopted son or otherwise, unless made under circumstances of strict necessity.' " (f)

(a) MS. 1716.

(b) *Prannath Rai v. R. Govind Chandra Rai*, 5 C. S. D.A. R. 37. "An adopted son is in most respects precisely similar to a posthumous son." Coleb. in 2 Str. H. L. 127.

(c) 3 Beng. S. D. A. R. 228.

(d) *Nathaji Krishnaji v. Hari Jagoji*, 8 Bom. H. C. R. 73 A. C. J.

(e) 7 M. I. A. 169.

(f) *Nathaji v. Hari*, *supra*.

Yet in the case last quoted it was laid down that an adopted son has an absolute vested interest and a right of action only from date of actual adoption (a), and that the power of adoption in a widow does not, *per se*, divest her of her life interest. Her position in the meantime is such as has already been described, (b) and as she is certainly a manager in possession, and represents the estate, her transactions with respect to it must, for the benefit of the estate itself, be upheld (c) where they have not been palpably detrimental or in excess of her limited powers of dealing with immoveable property inherited from her husband. (d)

In the case of a dispute between a widow and her husband's sapindas it was lately said by the High Court of Madras . . . "Where *bonâ fide* claims are made which call for adjustment, where the existence of the husband's consent to the adoption is in question, we consider that the powers of the widow and reversioners may not improperly be exercised to effect a settlement of the claims before an adoption is made, and that their exercise is not affected by the circumstance that the dispute as to the direction or consent conveyed to the widow was at the same time set to rest, and that the arrangements affecting the estate were made in contemplation of the adoption. The widow, although she may have received an express direction to adopt, could not have been compelled to act upon it, and she might have persisted in her denial that she had received authority to adopt, had the reversioners declined to allow her to retain possession of the jewels." (e)

(a) *Musst. Tarinee v. Bamundoss Mookerjee*, 7 C. S. D. A. R. 533.

(b) Above, pp. 94, 367.

(c) H. H. Wilson contends for the widow's full power of disposal. *Works*, vol. V. p. 66. Above, pp. 306 ss.

(d) See above, pp. 367, 368.

(e) *Lakshmana Ráu v. Lakshmi Ammal*, I. L. R. 4. Mad. 160, 165.

The right of inheritance then vests in an adopted son from the time of his adoption only, in this sense, that until the adoption by a widow, she fully represents the estate, though with limited powers, and may maintain suits concerning it. Such a suit continued in her own name after an adoption was held to have been maintained by the widow as guardian of the adopted son. (a) For other purposes the adoption reacts as from the moment of the adoptive father's death.

The continuity of existence with the deceased does not affect rights and interests which were not his in his life or which are not a mere development of these. (b) Thus where a new grant had been made, it was ruled that the absolute ownership of Government in the interval from the death of the Rajah until the act of State by which a transfer of territory was made to his widows and daughters was fatal to the claim of a defendant, in preference to the widow, as lineal heir to the Rajah, by right of adoption, though the adoption was valid (in all other respects). (c)

#### I. 1. A. 6.—ADOPTION IS IRREVOCABLE AND IRRENOUNCEABLE.

Adoption once really made is indefeasible. (d) Accordingly the *Sâstris* say:—"An adoption made with due ceremonies and followed by the *chaul* cannot be set aside." (e) "It is

(a) *Dhurin Das Pandey v. Musst. Shama Soondri Dibiah*, 3 M. I. A. 229; S. C. 6 C. W. R. P. C. 43; 2 Str. H. L. 127.

(b) See below, Sub-sec. B. 2. 6 (b).

(c) *Jijoyiamba Bai v. Kamakshi Bai*, 3 M. H. C. R. 424.

(d) 2 Str. H. L. 142. See above, pp. 365, 938. "An adoption concluded agreeably to the *Sâstras* is not annulable. It is not retractable among *Brâhmaus* after the Hom ceremony has been performed, nor among the lower castes." Steele, L. C. p. 184.

(e) MS. 1752. "The inadvertent omission of an unessential part, as sacrifice is, even where it is enjoined, does not vitiate an adoption." Coleb. Dig. Bk. V. T. 273 Comm.

"The adoption being complete, it cannot be annulled. An adopted son may be disinherited for like reasons as the legitimate son

held that, if a lad be adopted into a family, even where it is not the custom to perform homam (sacrifice of adoption), he cannot be turned out of it at will." (a)

When a widow sought to violate this rule the Court said—  
"Nor can we admit that the facts and the validity of the joint adoption (by two widows) being unquestionable, she is singly competent to set aside or annul in any degree an act which must be assumed to have been performed in obedience to the injunctions of her deceased husband." (b)

An adopted son cannot renounce his family of adoption and the consequent obligations to which he is subject. He can but resign his rights in that family. (c) A Śāstri declared that "an adoption cannot be annulled except on sufficient grounds (i. e. not by mere agreement)," (d) and the decisions rule that the status created by adoption cannot be given up by the adopted son (e) or dissolved by the parties immediately concerned.

Where a woman sought to disclaim an adoption made by her by a deed purporting to convey her property to her illegitimate son, this was pronounced illegal, though the upa-nāyana of the adopted had been performed (after adoption) in his real father's house. "The adoption," Colebrooke said, "being once completely and validly made it cannot be recalled." (f)

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(Mitāksh. on Inheritance, Chap. II. Sec. X.), but he cannot forfeit the relation of son." Coleb. in 2 Str. H. L. 126.

(a) 2 Str. H. L. 126.

(b) *Ry. Roop Koour v. Ry. Bishen Koour*, N. W. P. S. D. R. N. S. Pt. II. 1864, p. 655.

(c) Above, p. 938. Comp. pp. 340, 792.

(d) MS. 1741. See *Mohapattur v. Bonomallee*, Marsh, R. 317.

(e) *Ruvee Bhudr v. Roopshunkar*, 2 Borr. 713.

(f) 2 Str. H. L. 111.



In one case of an adoption of doubtful validity it was indeed ruled that—If after becoming of age an adopted son execute an agreement acknowledging the validity of his right to depend on his performance of certain conditions, his infraction of these will nullify his right. (a) But the soundness of this judgment seems open to doubt. (b) A man must belong to the one family or the other, it cannot rest on the mere option of another person. (c)

#### A. 7.—NO RETURN TO THE FAMILY OF BIRTH.

This follows from the principles already laid down. According to the Śāstri—"The son given in adoption cannot be reclaimed." (d)

To a question put to the Śāstris by the Court in another case they replied :—

"If any one about to adopt should receive from one not related to himself in the male line that person's son, and should perform his adoption according to the ceremonies of the Vêda, and after that cause his regeneration by performance of the choora and opanayana saṃskâr, &c., (tonsure at three years of age; investiture with the string at five or eight years; and the remaining regenerating ceremonies) in the name of his own gotra, or paternal line, that son so invested with the lineage and estate of the adopter has no right to keep up connexion with the other lineage, that is, he cannot return to his own....." (e)

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(a) *Musst. Tara Muneo Dibia v. Dev Narayan et al*, 3 C. S. D. A. R. 387.

(b) See *Balkrishna Trimbak Tendulkar v. Savitribai*, I. L. R. 3 Bom. 54.

(c) See *In re Kahandâs Nârândâs*, I. L. R. 5 Bom. at p. 164. Above, p. 187, and Sec. VI. A. 6 of this Book.

(d) MS. 1748.

(e) *Ruvee Bhudr v. Roopshunker*, 2 Borr. 656.

In Bengal as in Bombay the adopted son cannot return to his family of birth. (a)

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**A. 8.—THE CONNEXION BY BLOOD WITH THE FAMILY OF BIRTH IS NOT EXTINGUISHED.**

Although there is a complete severance in religious and secular interests from the family of birth, the artificial status is not allowed to make marriage possible between an adopted son and his real mother or sister. It is only the religious and ceremonial connexion with the family of birth that is extinguished, and as the Datt. Mīm. VI. 10 says, adoption does not remove the bar of consanguinity operating against intermarriage within the prohibited degrees. (b)

**A. 9.—TERMS AND CONDITIONS.**

The incongruity of an adoption, the operation or abiding validity of which is to be subject to a term or condition has already been noticed. (c) In a case of this kind the Court said—

“We \* \* cannot find that the Hindū law recognizes a conditional adoption, which appears to leave unsecured, and in jeopardy, the objects contemplated by the adopting, and to involve an element of injustice to the adopted party \* \* Insubordination to the widow of the deceased adopting father being an insufficient [reason] \* \* we hold that he could not

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(a) *Sreemutty Rajcomaree Dossee v. Nobcoomar Mullick*, 2 Sevestre, 641 note.

(b) *Mootia Moodelli v. Uppon Venkatacherry*, M. S. D. A. R. for 1858, p. 117; *Narasammāl v. Balarāmdhārloo*, 1 M. H. C. R. 420. See above, p. 1022.

(c) Above, p. 187 Note (d). Under the Roman law there could be no “*adoptio ad diem*” or “*sub conditione*.” as mancipation by which it was originally effected was a solemn public act not susceptible of qualification. See Maynz, Cours. de Dr. Rom. Sec. 412; Goudsm. Pand. p. 155; Maine, Anc. Law, p. 206 (3rd Edn.).

legally do so (a) and that the entry of such condition in the *wajib-ool-urz* (b) is worthless and ineffective. Nor do we admit that any value or efficacy would accrue to the entry, or that any validity would be given to the condition, even if the defendant, \* \* when still very young, whether he were legally of age or not, authenticated the *wajib-ool-urz*, *pro forma* with the view of curing the ostensible defect of its having been authenticated by his father after his decease. It would be extremely inequitable to hold that he thereby deliberately intended to express his assent to the conditions \* of which it is quite possible, and not at all unlikely, that he was ignorant. Even if he were aware of it, and ignorantly supposed himself to be bound by it, we are not prepared to admit that he is for that reason bound by it." (c)

In discussing under the preceding Section (d) the legal possibility of making an adoption subject to terms differing from those annexed to it by the law, the effects of agreements and of adoptions thus made have been to some extent considered. It would seem, that of the several cases which occur in practice that of the adoptive father's stipulations for preserving the estate, and securing his widow against destitution could not be refused effect by the Courts, so far at any rate as they bear on his separate or sole property. But if a man adopting for himself may do so on terms varying the usual rights of the son, it is but a slight extension of the principle when wills are once admitted to say that he may by a power or will allow his widow to impose such terms. And when a widow takes the whole estate without any will or direction to adopt, but with an assumed license from

(a) i. e. prescribe such a condition.

(b) A petition, memorial.

(c) *Per Curiam* in *Ram Surun Das v. Musst. Pran Kooer*, N. W. P. S. D. R. Pt. I., 1865, p. 293. Comp. the remarks of the Judicial Committee above, Sec. VI. A. 6.

(d) Sec. VI. A. 6.

her husband, it may be conceived that he knowing an adoption was probable, but entirely at the option of the widow, has given her a tacit authority to make her own terms. This logical development of the principles involved in the allowance of a will seems to be contained in the following two cases.

Where a power of adoption had been given by will to a wife coupled with a direction that the widow should during her life retain the whole of the testator's property, ancestral as well as self-acquired, it was held that the widow, after adopting, had a life interest with remainder to the adopted son. (a)

In *Ramasami Aiyar v. Venkataramaiyan* (b) where the natural father of a boy, whom the widow of a deceased Hindû proposed to adopt as a son to her husband, entered into a written agreement with her to the effect that the boy should inherit only a third of the property of his adoptive father, the Privy Council held that the agreement was not void, but was at least capable of ratification when the adopted son became of age. *Chitko v. Janaki* (c) was referred to doubtfully. The stipulation that the boy adopted as a son should obtain that status without the corresponding rights was one, no doubt, unwarranted by the Hindû law of the Śāstras, and was subject to challenge by the son until he had ratified it on becoming *sui juris*. The Paṇḍits consulted in Bengal on this point had said that an instrument by which a widow adopting a son reserved the property to herself for life was not lawful. The adopted son, they said, in spite of such

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(a) *Bepin Behari Bundopadhyaya v. Brojo Nath Mookhopadhyaya*, I. L. R. 8 Calc. 357, following *Musst. Bhagbutti Dase v. Chowdry Bholanath Thakoor et al.*, L. R. 2 I. A. 256. The latter is not a case of adoption, but of a settlement by a man on his wife with the concurrence of his kṛitrima son, to whom was given a remainder on the wife's death.

(b) I. L. R. 2 Mad. 91.

(c) 11 Bom. H. C. R. 199.

an instrument, was entitled to the estate. (a) In a somewhat similar case in Bombay, an adoptive mother (Koli) made an agreement with her son, whereby he resigned to her the bulk of the family property. This was pronounced by the Śāstri illegal, and the adopted son, if capable, was, he declared, still entitled to inherit, subject to the duty of maintaining the mother. (b) But wills also are not allowed by the Śāstras, and yet in one form or another they have grown up to meet social needs, even within the sphere of the Hindū law. So too the customary law has approved reasonable arrangements for the adopting mother's security. It seems impossible now to say that this advance will not be maintained. (c)

Cases such as that of *Ramguttee Acharjee v. Kristo Soon-duree Debia*, referred to above at p. 1110 note (c), must raise questions as to whether by the disposition the adopted son takes a vested estate forthwith on his adoption, although his enjoyment or actual possession be deferred, or whether

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(a) *Musst. Soolukhna v. Ram Doolal Pandeh*, 1 C. S. D. A. R. 324 (1st Edn.) Above, p. 177 (c).

(b) MS. 15.

(c) Any interest that a widow allows an adopted son to take in possession during her own life must so far be a detriment to her own estate, seeing that she is owner of the whole, and cannot, according to the Śāstris, be deprived of this which they regard as a jointure by any testamentary disposition made by her husband. In the case of *Musst. Goolab v. Musst. Phool* (1 Borr. 173) the Zilla Judge proposed to the Śāstris a question—Can a man separated in interest from his brother, and whose wife is alive, bequeath his property to his brother's son? The answer resting on the *Mitāksharā* was—"The wife . . . has a right to inherit her husband's estate, and a will made by the husband . . . in favour of his brother's son is not valid." (pp. 175, 176.) This was confirmed by the Pandit of the Sadr Court (p. 180). The theory of a power of bequest equal to the power of gift was not accepted by the law officers in these cases, and the widow was regarded as taking by a kind of survivorship, though no doubt with a restricted interest or faculty of disposal.

his estate is wholly contingent or future. Such questions will probably be dealt with according to the analogies furnished by the English cases. A gift subject to a condition precedent could hardly be made under the Hindû law, (a) though one deferred, or by way of remainder, would not be inconsistent with it, the ascertained interest being created from the first. Such an estate, immediate in interest though deferred in enjoyment, must have been contemplated by the Court in the following remarks:—"Whatever directions an adoptive father may have given in regard to the time when the son was to get into the management and enjoyment of the estate, still he was the son and heir from the time of his adoption, and by his death apparently the mother would succeed him." (b)

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I; 1. B.—SPECIFIC EFFECTS.

B. 1.—AS TO THE RELATIONS BETWEEN THE ADOPTED AND HIS FAMILY OF BIRTH.

B. 1. 1.—BETWEEN THE NATURAL PARENTS AND THE SON—IMMEDIATE PERSONAL RELATIONS.

(a) PARENTS THE ACTIVE SUBJECTS.

"When a father has given his son in adoption, his status and rights as father are extinguished." (c) Accordingly it was ruled, that the adoptive parents have a right to the guardianship and society of the adopted son superior to that of the natural parents. (d) The boy is often left for a longer or shorter time with his family of birth, but "though an infant after adoption be brought up by his natural parents, they must on demand surrender him to the widow who

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(a) See above, pp. 186 ss.

(b) Per L. Jackson, J., in *Gobindo Nath Roy v. Ram Kanay Chowdhry*, 24 C. W. R. 183.

(c) MS. 1759.

(d) *Lakshmibai v. Shridhar Vasudev Taklé*, I. L. R. 3 Bom. 1.

adopted him. (a) "The natural father need not incur the expense of getting the boy married; it devolves properly on the adoptive mother. She cannot recover from his father the expenses of his adoption and investiture. She cannot restore the boy, nor can the father reclaim him on the ground of having got him married." (b)

"Tonsure performed in the family of the natural father, after gift, has no vitiating effect." (c)

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(b).—SON THE ACTIVE SUBJECT.

"A boy severed by adoption from his own family and incorporated in the adoptive family is not affected in status by performing the funeral ceremonies of his natural father and mother." (d)

"An adoptee performs the ceremonies of Kreea and Puksh for his [natural] father and relations, only in case his natural father should die without any other son or near relation, when he would perform them as a Dharmapûtra. An adopted performs Satak (e) for his natural family according to their adoptive relationship." (f)

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(a) In the *Mānkars'* case the Śāstris in the opinion quoted above, p. 1010, recognize a widow's direct interest in adoption for securing her own future happiness. See too p. 938.

(b) MS. 1754.

(c) *Musst. Doolubh Dai v. Manee Beebee*, 5 C. S. D. A. R. 50. "The adoption of a child . . . . for whom tonsure and other ceremonies were afterwards performed under the family-name of his natural father, would be nevertheless valid: for the ceremony of tonsure performed under the family name of his natural father is void, because he did not then belong to that family; and because the ceremony is performed by one who had no right to do so; since he truly became son of the adopter, and certainly belonged to his family, not having been already initiated under the family-name of his natural father when the adoption took place." Coleb. Dig. Bk. V. T. 273 Comm.

(d) MS. 1673.

(e) Sâtaka—Impurity; here ceremonies for its removal.

(f) Steele, L. C. p. 185.

"Since it is not a fit practice for a son given to perform the obsequies of his former mother, it is proper to take for adoption a boy whose mother is living, and who is given both by her and by her husband." (a)

"In case of being adopted by his father's brother, the adoptee is enjoined to perform the Śrāddha both for his natural and adoptive fathers, inheriting the property of the former, however, only in default of heirs in order of succession before brothers' sons." (b)

An adopted son is considered in the nature of a purchaser for valuable consideration, which is his loss of inheritance in his natural family. (c)

#### B. 1. 2.—RELATIONS AS TO PROPERTY.

"An adopted son forfeits all right of inheritance in his natural family." (d) "He (the adopted son) cannot, after being adopted, claim the family and estate of his natural father, which follow the funeral oblations; nor is he liable to pay his natural father's debts." (e) "He (an adopted son) can only inherit from his natural father, in default of other heirs in previous order of succession . . . . . in virtue of his adoptive, not his original, relationship." (f) Even where the sacrificial idea is absent, "a Jain adopted by his uncle

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(a) Coleb. Dig. Bk. V. T. 275 Comm. The conception is that without a positive resignation the mother's claim to the son's religious services may continue.

(b) Steele, L. C. p. 47. He ranks as a brother's son.

(c) *Gopeymohun Deb v. Rajah Ray Kissen*, cited in *Doe Dem Hencower Bye v. Hanscower Bye*, East's Notes, Case 75; 2 Morl. Dig. p. 133. See above, Sec. VI. A. 7.

(d) *Appaniengar v. Alemalu Ammal*, M. S. D. A. Dec. 1858, p. 5.

(e) Steele, L. C. p. 47; Mit. Chap. I. Sec. XI. para. 32; above, p. 365; Coleb. Dig. Bk. V. T. 181; Manu IX. 142. The term "funeral oblation," intends that which is made for a father.

(f) Steele, L. C. p. 136.



ceases to be heir as son to his natural father." (a) The Śāstri added that "what he had acquired before adoption by using the capital of his natural father belonged to the latter." (b) The natural relation was in fact jurally annulled, and his father would no more inherit from him than he from his father. (c) But in an emergency the Śāstri says—"Should the natural parents have no other heir, the son they gave in adoption may perform their Śrāddhas and take their property also." (d)

After adoption, the person adopted cannot mortgage property belonging to his natural family, nor can his widow do so after his death. (e)

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#### B. 1. 3.—RELATIONS AS TO OBLIGATIONS.

The natural father is not responsible for the debt of a son given in adoption. (f) Nor conversely is the son liable. (g) Thus the Śāstri says:—"A son given in adoption must pay his natural father's debts only if he has inherited property from the natural father," (h) and in the case of a suit it was ruled that an adopted son is not liable for debts of his natural father who died in jail in execution of a decree for debt against him. (i)

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(a) MS. 1757.

(b) MS. 1756.

(c) Coleb. in 2 Str. H. L. 129.

(d) MS. 1761.

(e) *Yesubai kom Daji v. Joti*, Bom. H. C. P. J. 1875, p. 16.

(f) 2 Str. H. L. 125; see *Udaram Sitaram v. Ranu*, 11 Bom. H. C. R. 76, 84, 86.

(g) *Pranvullabh v. Deokristen*, Bom. S. D. A. Sel. Rep. 4.

(h) MS. 1758. See above, p. 365.

(i) *Pranvullabh Gokul v. Deokristen Tooljaram*, Bom. Sel. Rep. p. 4.

**B. 1. 4.—RELATIONS BETWEEN THE ADOPTED AND  
THE OTHER MEMBERS OF HIS FAMILY BY BIRTH—  
IMMEDIATE PERSONAL RELATIONS.**

An adopted son is to be considered as one actually begotten by the adoptive father in all respects except an incapacity to contract a marriage in his family of birth. (a)

“Adoption does not remove the bar of consanguinity operating against intermarriage within the prohibited degrees.” (b)

“An adopted son is restricted from intermarrying with any girl of either his natural or adoptive families within the prohibited degrees, and his descendants are under a similar restriction with regard to the former family to the third generation, viz. so long as remembrance may continue of the adoption.” (c) “He cannot intermarry with either his natural or adoptive gotr.” (d)

A Śāstri said in one case, that “adoption severs the connexion with the natural relatives so completely that the adopted son’s widow may adopt his younger brother.” (e) We have seen that there is some authority for this kind of adoption, (f) but the better opinion appears to be that embodied in the ruling that an adopted son cannot adopt as his son his brother by birth. (g)

(a) *Narasammāl v. Balardmāchārlu*, 1 M. H. C. R. 420. The same case pronounces strongly against the adoption of a sister’s son in the Andhra or Telingana country.

(b) *Moottia Moodelli v. Uppon Vencatacharry*, M. S. D. A. Dec. 1858, p. 117.

(c) Steele, L. C. p. 47. Above, pp. 937, 938.

(d) Steele, L. C. p. 186.

(e) MS. 1625.

(f) Above, p. 1021.

(g) *Moottia Moodelli, v. Uppon Vencatacharry*, M. S. D. A. R. 1858, p. 117.

## B. 1. 5.—RELATIONS AS TO PROPERTY.

“A son (an only son) who, having been given in adoption has passed out of his family of birth, has no longer any claim to the property of that family,” (a) and reciprocally, a member of a Hindû family cannot as such inherit the property of one taken out of that family by adoption. His severance is so complete that no mutual rights as to succession to property can arise between him and his relations of the natural family. (b) Hence it was said, that on an adopted son dying without issue, his property reverts to his adoptive family, his introduction into the new family causing his severance from his natural kindred, and they forfeiting all claims to succeed to his estate. (c)

## B. 2.—CONSEQUENCES AS CREATING RELATIONS IN THE FAMILY OF ADOPTION.

## B. 2. 1.—BETWEEN THE PARENTS AND ASCENDANTS, AND THE SON AND DESCENDANTS—IMMEDIATE PERSONAL RELATIONS.

## (a) PARENTS THE ACTIVE SUBJECTS.

“An adoptive father is entitled to the custody of the person of the adopted son.” (d) It follows that the proper residence of an adopted son is with his adoptive parents. (e) The only exception is in case of cruelty or incapacity. Thus it was ruled that the adoptive parents, if willing, have a

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(a) MS. 1756.

(b) *Narasammál v. Balarámachárlu*, 1 M. H. C. R. p. 420; *Ráyan Krishnamáchariyár v. Kuppannayyargar*, 1 M. H. C. R. p. 180; *Srinivasa Ayyangár v. Kuppan Ayyangar*, 1 M. H. C. R. p. 180.

(c) *T. M. M. Narraina Numboodripád v. P. M. Trivicrama Numboodripád*, M. S. D. A. R. for 1855, p. 125.

(d) MS. 1677.

(e) *Lakshmibai v. Shridhar Vasudev Takle*, I. L. R. 3 Bom. 1.

better right to act as guardians of their adopted sons than the natural parents, in the absence of proof of ill-treatment towards the boy or incompetency on their part to take care of him; the boy's residence with the adoptive family being part of the consideration for adoption. (a)

An adopted son can claim maintenance from his father until put into possession of his share of the ancestral estate. (b)

"An adopted son's widow must be supported by her mother-in-law, who has got possession of the deceased's vatan." (c)

The chaul and munj of the adoptive son should be performed by the adopting widow (though but 10 years old). (d)

The adoptive parents' authority, as we have seen, (e) does not extend to giving away their son in adoption.

## B. 2. 1.—IMMEDIATE PERSONAL RELATIONS.

### (b) SON THE ACTIVE SUBJECT.

"Adoption is .....(1) to secure his (the adoptive father's) happiness in the future state by the adopted son's or his descendants' performance of funeral rites (kreea), mourning (sootak), and annual oblations of rice (srāddh sapinḍadān); and (2) to preserve the adopting parents' good name in the

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(a) *Lakshmi Bai v. Shridhar Vassudev*, Bom. H. C. P. J. for 1878, p. 7; S. C. I. L. R. 3 Bom. 1; *Sheo Singh Rai v. Musst. Dakho et al*, 6 N. W. P. R. 382.

(b) *Ayyávu Muppanár v. Niládatchi Ammal*, 1 M. H. C. R. p. 45.

(c) MS. 1928. The widow of a predeceased adopted son has of course the same right to maintenance as if he had been a son by birth. (Above, pp. 246 ss; *Dilraj Koonwar v. Soollan Koonwar*, N. W. P. S. D. A. R. for 1862, p. 240).

(d) MS. 1648. See Steele, L. C. 187. Above, p. 998. The ceremonies ought to be completed on the widow's attaining maturity.

(e) Above, p. 1040.

present world by the practice of alms-giving, feeding Brāhmins, pilgrimages and other Hindû virtues." (a)

"The forefathers of the adoptive mother only are also the maternal grandsires of sons given, and the rest, for the rule regarding the paternal is equally applicable to the maternal grandsires (of adopted sons)." (b)

"Though the adoption be not annulled, yet should the adoptee not perform his filial duties, he separates from his adoptive father, receiving some share of the property." (c)

An adopted son succeeds to the adoptive father's property, subject to the right of maintaining the widow. (d)

(a) Steele, L. C. p. 42. In *Ram Soonder Singh v. Surbanee Dāsi*, 22 C. W. R. 121, Mitter, J., says the prescribed repetition of the Śrāddhas implies a power of repeated adoption by the widow though a son should have attained maturity and passed through all the Saṃskāras. There does not seem to be any authority for this, but at any rate the duty would be that of the widow of the son should there be one. (See above, p. 93, and Sub-Sec. I. 1. A. 2 of the present Section, p. 1148).

(b) *Uma Sankar Moitro v. Kali Komul Mozumdar et al*, I. L. R. 6 Calc. 261. According to Datt. Mīm. VI. para. 50, the manes of the adoptive mother's ancestors benefit by the Śrāddhas celebrated by the adopted son. "In the double set of oblations, it is indispensably necessary that the son should perform the Śrāddha for the paternal line, not for the line of his maternal grandfather: but it is simply reprehensible in one who performs the Śrāddha for the paternal ancestors, not to perform it also for the maternal grandfather and his progenitors. Consequently, since the Śrāddha may be performed without noticing the maternal grandfather's line in a subordinate double set of oblations, and the like, the Śrāddha for the maternal ancestors is not requisite to the completion of the obsequies performed in the dark fortnight of Aswina." Coleb. Dig. Bk. V. T. 273 Comm.

(c) Steele, L. C. p. 185; above, p. 939. As to a second adoption on the refusal or incapacity of the first adopted to fulfil his duties, see above, pp. 585, 587, 938, 946.

(d) *Rungama v. Atchama*, 4 M. I. A. p. 1; S. C. 7 C. W. R. 57 P. C. See above, p. 248. "The adoptee is bound to provide the widow in necessaries." Steele, L. C. p. 188.

“There being a born son and an adopted son, they are jointly and severally responsible, according to their means, for the support of their parents.” (a)

“A daughter-in-law adopts a son, and as his guardian manages the estate. The mother-in-law can claim maintenance from her.” (b)

A widow of an adoptive father being refused maintenance by the adopted son sold part of the estate in her possession. The Śāstri said the adopted son could recover it only on payment of the purchase money and interest. (c)

## B. 2. 2.—RELATIONS BETWEEN THE PARENTS AND THE SON WITH RESPECT TO PROPERTY.

### (a) BETWEEN THE ADOPTIVE FATHER AND SON.

An adopted son has all the rights of a son born. (d)

An interest vests in the adopted immediately on his adoption, (e) though he be a minor, and he is entitled to the

(a) MS. 1842.

(b) MS. 1831.

(c) MS. 16. See above, pp. 252, 653, 762; below, Sub-sec. B. 2. 2. (b). Provision may be made for a widow's maintenance before ejecting her. (See above, p. 653.)

(d) Steele, L. C. 47; *Maharajah Juggurnath Sahaie v. Musst. Mukhun Koomwur*, 3 C. W. R. C. R. 24; *Teencowree Chatterjee v. Dinonath Banerjee*, 3 C. W. R. C. R. 49; *Ry. Kishenmunee v. Raj Oodwunt Singh*, 3 C. S. D. A. R. 228; *Srinivasa Ayyangár v. Kuppan Ayyangár*, 1 M. H. C. R. 180; *N. Chandrasekharudu v. N. Bramhanna*, 4 M. H. C. R. 270; *R. Vyankatray v. Jayavantray*, 4 Bom. H. C. R. A. C. J. 191; *Trimbuk Bajee v. Narain Venaik*, 3 Morris 19; *Ráyan Krishnamáchari-yár v. Kuppannayyangár*, 1 M. H. C. R. p. 180; *Sree Narain Rai v. Bhya Jha*, 2 C. S. D. A. S. 27.

(e) *Sudanund Mohapattur v. Sorjo Monee Debee*, 8 C. W. R. 455; S. C. 11 C. W. R. 436; reversed, 20 C. W. R. 377, by the Judicial Committee on the ground that the validity of the will questioned by the adopted son had been adjudged in a previous suit by him.

profits after his adoption, (a) as also to immoveable property purchased with money derived from ancestral estate, which property continued to exist at his adoption. (b)

“A man who has adopted cannot alienate immoveable property without good reason. With reason he may, especially what he has himself acquired.” (c) The older cases agree with this opinion, as when the Judicial Committee ruled that by adoption a person divests himself of his right to dispose of immoveable property without the consent of the son adopted. (d) Adoption, however, it has been ruled, is not a valuable consideration proceeding from the boy adopted in such a sense as to bind the adoptive father against an alienation of his self-acquired property. (e) The adopted stands in this respect on precisely the same footing as a son by birth. (f) The case might have been dealt with on the ground that where no more was engaged for, the adoption gave to the adopted only the ordinary advantages of a son.

(a) *Sreemutty Deeno Moyee Dossee v. Doorga Pershad Mitter*, 3 C. W. R. Misc. 6.

(b) *Sudanand v. Bonomallee*, 6 C. W. R. 256, and cases in Note (i) above.

(c) MS. 1725.

(d) *Rungama v. Atchama*, 4 M. I. A. 1; S. C. 7 C. W. R. P. C. 57. See above, pp. 614 ss, 208 ss.

(e) *Purshotam Shenvi v. Vasudev Shenvi*, 8 Bom. H. C. R. 196 O. C. J.

(f) The case of *Mohapattur v. Bonomallee* (see above, p. 723) was relied on, because as in it the first adopted son suing as heir did not dispute the father's disposal of his self-acquired property, it was thought apparently that it could not be disputed. But that was a Bengal case, and in Bengal the relations of father and son as to property are different from what they are in Bombay (see *Dayabhaga*, Chap. II. 8, 17, 18, 28-30; 2 Str. H. L. 437, 444; Mit. Chap. I. Sec. I. para. 27; above, p. 667; 12 M. I. A. at p. 38, there referred to; 2 Str. H. L. 449). Under the *Mitāksharā* the son has a joint interest in the immoveable

Had a contract been made or property settled on the son, there seems to be no doubt that on the principle of the cases referred to in Sec. VI. A. 6 and 7, his becoming an adopted son would be a consideration (a) such as would make the transaction binding.

The right of interdiction has been recognized by the Śāstris as acquired by adoption as in the following instance—  
 “An adopted son can claim from his father property that the father is making away with in order to deprive the son of it, (b) as an alienation made in order to deprive a son or brother may be rescinded by the State.”

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property acquired by the father. He must submit to his father's dealings with such property on account of his subordination and the father's freedom from control (self-government) as manager (*see* above, pp. 211, 648), but this subjection cannot last beyond the father's life. The father's right is one of joint ownership plus *svatantrata*, unshared control (*see* 2 Str. H. L. 443). On his death the son's right by survivorship makes him complete owner, and the father's will cannot operate against him, although it would be effectual against others, not co-owners, only successors. (*See* above, p. 587). The right to sell is not identical with the right to give, nor is the right to give identical with the right to devise (*see* above p. 219). This is manifest from what the Judicial Committee say in *Lakshman Dada Naik's* case (I. L. R. 5 Bom. at pp. 61, 62); and though the law of wills follows the analogy of the law of gifts it need not go so far. It is plain that it does not; and the power of a father to devise his acquired lands away from his son cannot apparently be rested on the recognized authorities (*see* Vyav. May. Chap. IV. Sec. I. paras. 4, 5; Colebrooke at 2 Str. H. L. 435, 436). In the case of *Musst. Goolab and Phool* (above Sub-Sec. A. 9), the Śāstris and the Courts refused effect to a will which went to deprive widows of their right of inheritance, though undoubtedly the wives could not have interfered with their husband's dealings during his life. Ellis at 2 Str. H. L. 428 expresses a similar opinion. Colebrooke differed only because he thought the power followed from wills ranking as gifts. The right of a son is as co-owner, that of the wife altogether dependent (*see* *Narbadabai v. Mahadev Narayan*, I. L. R. 5 Bom. 99).

(a) *See Bhela Nahana v. Parbhu Hari*, I. L. R. 2 Bom. 67.

(b) MS. 1735.



A Joshi having an adopted son, 15½ years old, executed a deed of gift of part of his vatan to his daughter's children. This was endorsed with an assent by the natural father of the adopted son. Such signature was pronounced useless. But the adopted son was pronounced answerable to make good a gift of part only of the vatan. (a)

"A gift of a house made by a Brāhman to his mistress does not enable her to dispose of it to the detriment of his subsequently adopted son, though she may retain it for life if she behaves becomingly to her master" (i. e. apparently the son). (b)

"An adopted son may claim a division of ancestral property from his father, but not of his father's own acquisitions." (c)

"An assignment of a village for maintenance to an adopted son cannot be revoked." (d)

An adopted son can sell his right, title, and interest in his share of undivided family property. (e)

"An adopted son's son can claim a share of the grandfather's (former) property though his father be alive, unless the property having been mortgaged or alienated the father has recovered it." (f)

(a) MS. 711. See above, p. 194.

(b) MS. 712. See above, pp. 762, 763. The donor could by an explicit grant give her a larger interest. See above, pp. 208, 293, and Sec. VI. A. 6 of this Book.

(c) MS. 1731. In answer to Q. 1704, it is said, he cannot claim a partition (nature of property not specified).

(d) MS. 790. This was probably understood as a case of partition. See above, pp. 702, 939.

(e) *Rutoo bin Bapooji v. Pandoorangacharya*, Bom. H. C. P. J. 1873, p. 176. The son was tenant of the whole property, and his interest was sold in execution. The purchaser was pronounced liable to the adoptive father for a moiety of the rent, he having been put into possession of the whole. See above, p. 663.

(f) MS. 1736. See above, p. 722.

An adopted son becomes heir to the whole of the adoptive father's property, and is excluded from inheritance in his own family. (a)

A son, adopted by a widow under her husband's authority, supersedes all other heirs. (b)

A son, adopted by a widow of a predeceased son, succeeds to his grandfather's estate as well as to that of his own adoptive father, whether the adoption took place in the grandfather's lifetime or not. (c) If the adoption was made with the consent of the grandfather, his subsequent disposition or the birth of a son to his daughter in wedlock will not invalidate the adoption. (d)

An adopted son takes by inheritance and not by devise (e) in the case of his adoption by a widow under an instrument providing for the boy only as an adopted son and successor.

(a) *Bhasker Buchajee v. Narro Ragoonath*, Bom. Sel. Rep. p. 25; *Duttnaraen Singh v. Ajeet Singh et al*, 1 C. S. D. A. R. p. 20; *Gopeymohun Deb v. Raja Ray Kissen*, see East's Notes, Case 75; *Ranee Bhuvanee Dibeh v. Ranee Sooruj Mune*, 1 C. S. D. A. R. p. 185; *Srinath Serma v. Radhakaunt*, 1 C. S. D. A. R. p. 15; *Appaniengar v. Alemaloo Ammal*, M. S. D. A. R. for 1858, p. 5; *Raje Vyankatrav v. Jayavantrav*, 4 Bom. H. C. R. A. C. J. p. 191.

(b) *Veerapermal Pillay v. Narain Pillay*, 1 Str. 91; *Nundkomar Rai v. Rajindernaraen*, 1 C. S. D. A. R. p. 261. "Such child may be provided for as a person whom the law recognizes as in existence at the death of the testator, or to whom by way of exception, not by way of rule, it gives the capacity of inheriting or otherwise taking from the testator as if he had existed at the time of the testator's death, having been actually begotten by him." Willes, J., in the *Tagore Case*, L. R. Supp. I. A. at p. 67. See above, p. 983.

(c) *Gourbullab v. Juggernotpersaud Mitter*, Macn. Con. H. L. 217.

(d) *Ramkishan Surkheyl v. Musst. Sri Mutee Dibe*, 3 C. S. D. A. R. 367. The assent of the grandfather was necessary on the principles stated in Sec. III. B. 3. 33.

(e) *Musst. Bhoobum Moyee Debia v. Ram Kishore Acharj Chowdhry et al*, 10 M. I. A. p. 279, 309; S. C. 3 C. W. R. P. C. 15; Beng. S. D. A. R. for 1856, p. 122. See above, Sec. VI. A. 6.

An adopted son, though separated from his adoptive father, succeeds to the residue of the latter's estate, undisposed of by him by gift or will, in preference to the widow, in case he dies leaving no unseparated son surviving him. (a)

On an adopted son's dying without issue his adoptive father's property goes, it was said, to his natural heirs. (b) This would depend on whether the son died before or after the father.

In a suit by an adopted son to set aside a will, the will was held of no effect as a valid devise of property. At the father's death the right of survivorship was in conflict with the right by devise. Then the former, being the prior title, took precedence. (c)

As an adopted son has no more rights than a natural son would have, so the adopter is at liberty, it was said, according to the law of Bombay, to dispose by will of immoveable property acquired by him, to any one he pleases. (d)

If an elder adopted son takes the whole of the ancestral property, which the father could not dispose of without his consent, he must give up for the benefit of the second adopted son the whole property included in the devise, to the disposition of which his consent was not necessary. (e)

(a) *Balkrishna Trimback v. Savitribai*, I. L. R. 3 Bom. 54. See above, p. 359.

(b) *Sabrahmaniya Mudali v. Parvati Ammal*, M. S. D. A. R. for 1859, p. 265.

(c) *Villa Batten v. Yamenamma*, 8 M. H. C. R. 6.

(d) *Purushotam v. Vasudev*, 8 Bom. H. C. R. 196 O. C. J. See above, pp. 208 ss, 641, 772.

(e) *Rungama v. Atchama*, 4 M. I. A. I; S. C. 7 C. W. R. P. C. 57. The right of the second adopted son rested wholly on the devise, his adoption being invalid.

A Hindû cannot disinherit a duly adopted son, even for bad character, nor can he adopt another. (a) It is only in an extreme case of violation of duty that a son's rights are lost, or that a father can disinherit an adopted son. Both stand on the same footing. (b)

Renunciation by an adopted son of his right in his adoptive father's property, though permissible, does not free him from adoption. If he resigns the right, the adoptive mother succeeds to the separate property of her husband. (c)

An adopted son may for money relinquish his share in the adoptive father's family. This puts him into the position of a separated son. It does not disinherit him. If he be disinherited for adequate cause his son takes his place as heir. (d)

On the death of an adopted son before that of the father his joint proprietary right, like that of the son by birth, is of

(a) *Dace v. Motee*, 1 Borr. 84. "It is declared that, if culpable, even a son of the body does not take the heritage, hence vicious sons, whether begotten in lawful wedlock or the like, or adopted as sons given and the rest, are excluded from participation; sons so adopted, being void of good qualities, shall have a maintenance: but such sons, being virtuous, shall take the inheritance of a father, or of his kinsman," Coleb. Dig. Bk. V. T. 278 Comm. See above, p. 575, 585, 587. A person cannot disinherit his son by will, *Gopeymohun Deb v. R. Raykissen*, East's Notes, Case 75; *Prantullubh Gokul v. Deokristn Tooljaram*, Bom. Sel. Rep. 4.

(b) *Sadanund Mohaputtee v. Bonomallee*, C. S. D. A. R. 1863, p. 205. See above, p. 1146. In Khandesh, it was stated in answer to Steele's inquiries, that exclusion from caste does not cause a forfeiture of property or of the right of inheritance. Steele, L. C. 152. See above, p. 907. But the holder of any religious office peculiar to Hindûs naturally forfeits it by change of religion. *Ib.* Answer from Sâtâra.

(c) *Ruvce Bhudr v. Roopshunker*, 2 Borr. 656. On his resigning, the right descends to the next in succession. This might be his son, who would take in preference to the mother.

(d) *Balkrishna v. Sabiribai*, I. L. R. 3 Bom. 54. See above, p. 372.

course absorbed in that of the father, (a) and his widow, should he leave one, is entitled to maintenance in the family of adoption. (b)

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B. 2. 2. (b).—BETWEEN THE ADOPTIVE MOTHER AND SON.

“As soon as a son is adopted by a widow, he succeeds to her husband’s estate. Her independent rights and those of her mother-in-law forthwith cease.” (c)

“The possession of authority to adopt a son by a widow in Bengal does not destroy or supersede her personal rights as widow, which continue until the adoption is actually made. . . . The property is in the widow from the death of the husband until the power of adoption is exercised. . . . It is only an alienation by the widow improper as against the subsequent heirs generally, that the adopted son can get rescinded. (d) The authorization in fact is as if non-existent until it is acted on by the widow. (e)

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(a) *Udaram Sitaram v. Ranu Panduji*, 11 Bom. H. C. R. 76, 86.

(b) 2 Str. H. L. 235. See above, pp. 246 ss, 758.

(c) MS. 1716. See Steele, L. C. 48, 49. “Presuming the property here spoken of as the woman’s to have been what devolved upon her by the death of her husband, and not to have been her proper *stri-dhana*, it ceased to be her’s at the moment of a valid adoption made by her of a son to her husband and herself; in the same manner as property coming into the hands of a pregnant widow by the same means, cannot be used by her as her own, after the birth of a son. An adopted child is in most respects precisely similar to a posthumous son. From the moment of the adoption taking effect, the child became heir of the widow’s husband; and the widow could have no other authority but that of mother and guardian.” Coleb. in 2 Str. H. L. 127.

(d) *Bamundoss Mookerjee v. Musst. Tarinee*, 7 M. L. A. 178, 180, 185, 206.

(e) *Uma Sunduri Dabee v. Sourobince Dabee*, 1 L. R. 7 Calc. 283. See above, p. 903.

An adopted son becomes son of both father and mother, and performs funeral rites to both. (a) He is heir to the adoptive father, and, in the absence of a daughter, to the mother's stridhana. (b) "In the lower castes a partition sometimes occurs, but the adoptee is heir to his adoptive mother, and generally manager during her life." (c)

Adoption by a widow in Bengal, under her husband's permission, deprives her of her widow's estate, (d) and entitles her to maintenance. (e) The same is the result, even when the adoption is valid without the husband's permission, as amongst the Agarvâli Jains. (f) It follows from this that a Hindû widow, after adopting a son, cannot mortgage the family property as her own, nor can such a transaction be validated by the son's ratification. (g)

An adoption works retrospectively and relates back to the death of the husband of the adoptive mother. It invalidates a gift or sale, unless it was effected under inevitable necessity, and entitles the adopted son to succeed to his estate as the same stood at the death of his adoptive

(a) *Teencowree Chatterjee v. Dinonath Banerjee*, 3 C. W. R. 49. "An adopted son," the judgment says, "has all the rights and privileges of a son born." Datt. Mîm. Sec. I. para. 22. "Women have legally no right to adopt for the transmission even of their separate property but . . . such a custom may obtain in the caste". Ellis in 2 Str. H. L. 128.

(b) Above, p. 513.

(c) Steele, L. C. p. 186.

(d) *Nundkomar Rai v. Rajindurnaraen*, 1 C. S. D. A. R. 261; *Musst. Solukhna v. Ramdopal Pande et al*, 1 C. S. D. A. R. 324; *Durma Samoodhany Ummal v. Coomara Venkatachella Reddyar*, M. S. D. A. R. for 1852, p. 111; *Radhabai v. Damodar Krishnarao*, Bom. H. C. P. J. for 1878, p. 9.

(e) *Musst. Rutna Dobain v. Purladh Dobey*, 7 C. W. R. 450.

(f) *Sheo Singh Rai v. Musst. Dakho*, L. R. 5 I. A. 87.

(g) *Siddheshvar v. Ramchandraraao*, I. L. R. 6 Bom. 463.

father. (a) In *Rajah Vyankatrao's* case the adoption was made by the widow about seventy years after her husband's death. (b) It follows from the widow's limited power that, as the Judicial Committee said, the rights of an adopted son are not prejudiced by any unauthorized alienation by the widow which precedes the adoption which she makes, (and though gifts improperly made to procure assent might be powerful evidence to show no adoption needed, they do not in themselves go to the root of the legality of an adoption). (c) In the case, however, of an adopted son succeeding collaterally, his right, it is said, vests only from the adoption. At least he cannot retrospectively take away what passed to another collateral through his own non-existence, when the succession opened. (d)

An adopted son, moreover, though he is competent to question his mother's acts during his minority or before his adoption, cannot question a sale effected by her with consent of all the legal heirs then existing and ratified by the Civil Courts. (e)

A woman's religious gift of a house as her own which belonged to the family estate was pronounced invalid as against the adopted son. "There is no merit in a *Krishnārpana* made without the consent of the son." (f)

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(a) *Rajah Vyankatrao v. Jayavantrav*, 4 Bom. H. C. R. A. C. J. 191; *Nathaji v. Hari*, 8 Bom. H. C. R. A. C. J. 67; *Ranee Kishenmune v. Rajah Oodwunt Singh*, 3 C. S. D. A. R. 228; *Bamundoss Mookerjea v. Musst. Tarinee*, 7 M. I. A. 169.

(b) See above, Sec. III. B. 3. 23; 3. 34.

(c) *The Collector of Madura v. Moottoo Ramalinga Sathupathy*, 12 M. I. A. 443.

(d) *Bamundoss Mookerjea v. Musst. Tarinee Dibia*, Beng. S. D. A. R. for 1850, p. 533; S. C. 7 M. I. A. 169; *Musst. Bhoobun Moyee Debia v. Ramkishore Acharj*, 10 M. I. A. 279; S. C. 3 C. W. R. 15 P. C.; Beng. S. D. A. R. for 1856, p. 122. On this subject see above, Sec. III. B. 3. 23; 3. 25; 3. 34; 3. 35; and below, B. 2. 5.

(e) *Rajkristo Roy v. Kishoree Mohun Mojoomdar*, 3 C. W. R. 14. See above, p. 367.

(f) MS. 714. For *Krishnārpana*, see pp. 99, 479.

First there was permission given to adopt, then a sale by a Court of the property, then after twelve years there was actual adoption under the permission. It was held, that what was sold was not merely the widow's interest, as the proceeds of the sale were applied to debts for which the property was liable. The purchaser was held not subject to eviction by the adopted son, after the death of the widow, who had enjoyed a life estate under the deed of permission to adopt. (a)

"Under pressure of absolute necessity only an adoptive mother, living apart from her son, may sell the immoveable family estate." (b)

A Sâdra widow after adopting a son bought a field in her own name. It was held that she could give this to her daughter against the wish of her daughter-in-law, though she could not alienate the common property. (c) As regards the patrimony the case would be different; the adopted son transmits to his widow a succession which excludes his mother. (d)

In the event of successive adoptions the relations of the parties are determined by the following decisions. In the first it was said—

"The first adopted son became his father's heir. On the death of that son the widow became the heir, not of her late husband, but of the adopted son." (e)

(a) *Rajah Debendro Narain Roy v. Coomar Chundernath Roy*, 20 C. W. R. 30 C. R. (P. C.) It may be questioned whether, on strict principle, the permission could thus cut down the adopted son's interest. See above, Sec. VI. A. 6. As to the widow's authority, see pp. 94, 367.

(b) MS. 14. This implies that the son is inaccessible, or else when applied to refuses sustenance. See above, pp. 653, 762. But the right is questionable in any case. She should sue the son. See pp. 245 ss, 653.

(c) MS. 1577. See above, pp. 314, 315, 507.

(d) *Vencata Soobamal v. Vencumal*, 1 Mad. S. D. A. B. 210.

(e) Privy Council in *Ramasawmy Aiyar v. Venkataramaiyan*, L. R. 6 I. A. p. 208.



Through adoption a widow, it was said, divests her own estate only, and by succeeding to her son as heir, she does not lose the right to exercise the power of adoption. (a) The correctness of this depends on the principles considered in Sec. III. (b) She would, it seems, lose the right by the adopted son's leaving a widow or even having attained full religious maturity. (c) In other cases of adoption by a mother it has been said that a widow who has succeeded to her son, and who afterwards adopts a son, thereby divests herself of the estate. (d) Regarded as an unseparated brother of the deceased the adopted son would take precedence of the mother. As a separated brother he would not ; but in adopting a son the widow must perhaps be considered as replacing the one deceased with all his rights. The transaction is so anomalous (e) that any determination of these points must be in a great measure arbitrary. In similar circumstances the Judicial Committee hesitated to give a final decision, saying only " whether by the act of adopting another son, she in point of law divested herself of that estate in favour of the second son, may be a question of some nicety, on which their Lordships give no opinion." (f) H. H. Wilson (g) says—" It may be safely asserted that the Hindû law has not provided for the case " of a new adoption after the death of the boy first adopted. It must rest entirely on local usage where this is proved or known to exist.

A second adoption does not nullify an intermediate alienation by a widow after the death of the first adopted son. (h)

(a) *Bykant Monee Roy v. Kisto Soonderee Roy*, 7 C. W. R. 392.

(b) Sub-Secs. B. 3. 23; 3. 25; 3. 35.

(c) See *Musst. Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry*, 10 M. I. A. at p. 310. Above, pp. 872, 1148.

(d) *Vellanki V. Krishna v. Venkata Rama Lakshmi*, I. L. R. 1 Mad. 174; *Jamnabai v. Raychand*, I. L. R. 7 Bom. 225.

(e) See above, p. 1013.

(f) *Ramasawmy Aiyar v. Vencataramaiyan*, L. R. 6 I. A. at p. 208.

(g) Works, vol. V. p. 63.

(h) *Gobindo Nath Roy v. Ram Kanay*, 24 C. W. R. 183.

The widow succeeded the first adopted son, who seems to have

A son adopted by the widow of a Hindû is legal representative of the deceased, and can maintain a suit under Act XIII. of 1855 for the benefit of persons entitled to compensation under the Act; but he is not entitled to any portion of the compensation awarded. Whether he would have been if adopted by the deceased himself is a question. (a)

A widow cannot sue as representative of her husband so long as her adopted son is alive, (b) nor can she prefer an appeal. A mere disclaimer by sons, and therefore by an adopted son, in the absence of proof of the widow's being herself the next reversioner after the sons (c) will not enable her to sue as owner. There must be a distinct assignment.

Where, pending a suit for partition by a widow in an undivided family, she adopts, though the suit is prosecuted in her own name, she is considered as guardian and trustee and accountable to her son for the profits of the property decreed. (d)

died in childhood. Her power of alienation would then be governed by the estate she took. See above, pp. 110, 330, 367, 449, 451. She would not be allowed to make a second adoption a means of fraud. See above, pp. 366 ss. Supposing the deceased son had sold or incumbered without reason, the anomaly of a second adoption acting retrospectively would be very manifest.

(a) *Vinayak Raghunath v. G. I. P. R. Co.*, 7 Bom. H. C. R. O. C. J. 113.

(b) *Ram Kannye Gossamee v. Meernomoyee Dossee*, 2 C. W. R. 49; *Jannobee v. Dwarkanath*, 7 C. W. R. 455; *Narsava alias Gangava v. Ramangavda*, A. D. 1868.

The widow must proceed in the adopted son's name after obtaining a certificate of administration under Act. XX. of 1864 unless the property is of a trivial value, falling under Sec. 2 of the Act.

(c) *Ram Kannye Gossamee v. Meernomoyee Dossee*, 2 C. W. R. 49; *Jannobee v. Dwarkanath*, 7 C. W. R. 455.

(d) *Dhurm Das v. Musst. Shama Soondri*, 3 M. I. A. 229; S. C. 6 C. W. R. P. C. 43. In Bombay she could not claim a partition. See above, p. 677.

An adoptive son like a real son will not, where there are dissensions, and a probability of waste, be allowed to take the estate out of his adoptive mother's hands without providing for her maintenance. (a) Nor can he, by selling the family dwelling, deprive her of her right to residence. (b)

As to the property more especially regarded as *strīdhana* the relations are thus stated :—

The adoptive mother “retains, during life, the right over her own property, but the adoptee is heir to his adoptive mother.” (c) “A son adopted by a widow,” the *Sāstri* said, even “without her deceased husband's permission, inherits her property.” (d)

The son adopted by a daughter-in-law after an adoption by her father-in-law succeeds to her and her husband's property. (e) The property taken in inheritance by a daughter is *strīdhana* according to the *Mitāksharā*. (f) Hence an adopted son succeeds to the property which his adoptive mother inherited from her father, (g) but not as first heir. An adopted son succeeds to his mother's *strīdhana* in the absence of daughters. (h)

As to the reciprocal succession to the son the decisions are:—A widow succeeds to her adopted son as to her son by

(a) *Jamnabai v. Raychand*, I. L. R. 7 Bom. 225. See above, pp. 264, 653, and as to the circumstances justifying a demand on the mother's part for a separate assignment of property, *Venkatammāl v. Andyappa*, I. L. R. 6. Mad. 130.

(b) See above, pp. 734, 826.

(c) Steele, L. C. p. 188.

(d) MS. 1710. This is not true in the Bombay Presidency, if without permission means contrary to his wish ; see above, pp. 970 ss ; 2 Str. H. L. 91.

(e) MS. 1666. See above, pp. 371, 946.

(f) Above, pp. 149, 151, 335.

(g) *Sham Kuar v. Gaya Din*, I. L. R. 1 All. 255. See too Coleb. Dig. Bk. V. TT. 273—275 Comm.

(h) *Teencowree Chatterjee v. Dinonath Banerjee*, 3 C. W. R. p. 49. See above, pp. 152, 324.

birth (a) and takes a life-interest upon the death of the adopted son under age. (b)

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B. 2. 2. (c).—RELATIONS BETWEEN ADOPTIVE  
STEP-MOTHER AND SON.

“The adopted son succeeds to all his step-mothers.” (c)

Where a widow had adopted a son under authority of her husband, on the death of the widow and the boy, the other co-widow was allowed to succeed to a moiety of the estate in her own right, not in that of a son adopted by her with due authority from her husband. (d) This decision is questioned, and it is obvious the widow had no right except to maintenance. The boy adopted by her, if validly adopted, was entitled to the whole estate.

On the death of one, adopted as son of one of two co-widows, the property does not descend to the other widow, but, it was said, to the next legal heir who was nephew of the original proprietor or adoptive father. (e) The succession being to the son, his step-mother's position would be determined by the rules given above, pp. 110, 470 ss.

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(a) 2 Str. H. L. 129.

(b) *Soondur Koomaree v. G. Pershad Tewarree*, 7 M. I. A. 54; S. C. 4 C. W. R. P. C. 116. See above, pp. 110, 449.

(c) MS. 1658. See above, p. 522. “If a son be adopted by a man married to two wives, he would have two maternal grandfathers, and would claim as maternal ancestry both their lines of forefathers. This seeming difficulty is thus reconciled: although there be two sets of maternal ancestors, they should be jointly considered as manes of ancestors, and they should be thus named in performing the Śrāddha, “Such a one, maternal grandfather, sprung from such a primitive stock! to thee (to each of you) this funeral cake is offered,” and so forth, as is done by the son of the wife considered as a son of two fathers. Thus some reconcile the difficulty.” Coleb. Dig. Bk. V. T. 273 Comm.

(d) *Narainee Dibeh v. Hirkishor Rai*, 1 C. S. D. A. R. 39.

(e) *Kasheeshuree Debia v. Greesh Chunder*, C. W. R. Sp. No. 71.

A son adopted by one wife may succeed to the strīdhana of another co-wife (a) in Bengal. In another case in that province the reciprocal right was denied. According to the Mitāksharā, it was said, a step-mother cannot succeed to the estate of her step-son, or a step-grand-mother to the estate of her step-grandson. (b) According to the principles admitted in *Lulloobhoy v. Cassibai*, (c) the step-mother ought to come next in succession to the father's mother, and the analogy of the law of partition is in her favour (above, pp. 653, 654, 677).

The importance of the right to adopt as between two or more widows becomes evident when it is borne in mind that the one taking the place of mother succeeds first to her son on his death without a child or widow. The step-mother is comparatively a remote successor. H. H. Wilson (d) discusses in rather caustic terms a Bengal case of a contest amongst three widows. (e) The youngest as mother of a posthumous son, who died, was entitled as his or as her husband's heir. The husband, however, had left directions for an adoption by his eldest or his youngest widow with the assent of the middle one. No concurrence proving possible, the master was ordered to report on a fit boy. He reported in favour of one named by the second widow, and son of her father's brother. This relation led the Court to order his adoption, not by the second widow but by the eldest. Thus the widow who had resisted his adoption became his mother and heir, while the one who had proposed him and the one in whom the estate had vested were reduced to the position of step-mothers. The property having been mostly ancestral, the learned author contends that the father could not by his will make a valid disposition which would

(a) *Teencowree Chatterjee v. Dinonath Banerjee*, 3 C. W. R. p. 49.

(b) *Lala Joti Lal v. Musst. Durani Kower*, B. L. R. F. B. 67.  
See above, p. 472.

(c) L. R. 7 I. A. 212.

(d) Works, vol. V. p. 58 ss.

(e) Sir F. Macn. Cons. on H. L. 168.

affect the complete title of his posthumous son, and the estate taken by that son's mother as his heir. (a) This, while it goes further, agrees in principle with the more recent decisions of the Judicial Committee (b) against the capacity of a mother-in-law to adopt under a power so as to divest her daughter-in-law of the estate taken by the latter in succession to her husband.

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B. 2. 2. (d).—RELATIONS BETWEEN ADOPTED SON AND GRANDPARENTS.

In *Ramjee Hurree v. Thukoo Bae* (c) a son adopted after the death of the propositus by the widow of his predeceased adopted son succeeded against the widow of the propositus in possession ; but the widow was allowed a life use of a moiety for her maintenance.

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B. 2. 3.—RELATIONS WITH RESPECT TO OBLIGATIONS.

(a) BETWEEN THE FATHER (AND GRANDFATHER) AND THE SON AS TO DEBTS AND CLAIMS.

"An adopted son like another is responsible independently of assets received for the debt of the grandfather by adoption though not incurred for the family." (d) Jagannātha agrees with the Śāstri. The adopted son's liability for his father's debt, he says, like that of the son by birth, arises at the father's death and is independent of assets. (e) A previous partition even only throws the burden first upon those sons who remained in union with the father.

An adopted son is liable for his father's debts to the extent of the inheritance received by him, and if he waives or

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(a) H. H. Wilson, Works, pp. 61, 62.

(b) *Bhoobun Moyee's case*, 10 M. I. A. 278; *Pudma Coomari Debi v. The Court of Wards*, L. R. 8 I. A. 229, 245.

(c) 2 Borr. R. 485. In this case the adoption divested an estate vested in the elder widow. See above, pp. 992 ss.

(d) MS. 979. See above, pp. 80, 160.

(e) See Coleb. Dig. Bk. I. TT. 167—170 Comm.

does not obtain the inheritance, his self-acquisition is not liable for the debts. (a)

A son adopted in pursuance of an *unoomoti puttro*, some time after the death of his adoptive father, does not require, and is not entitled to obtain, a certificate under Act XXVII. of 1860, to enable him to collect debts in respect of the properties left by his adoptive father, which accrued due while they were under the management of his adoptive mother. The estate of the adoptive father, if the adoption is a good one, vests immediately on the adoption in the adopted son, and debts to it, if they accrued due after the death of the adoptive father, are debts recoverable by the adopted son in his own right, and not as representative of his adoptive father. (b)

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B. 2. 3. (b).—BETWEEN THE ADOPTIVE MOTHER  
AND SON.

A mortgage [before adoption] by a widow to pay off her husband's debts was upheld as against a boy subsequently adopted. (c) On a similar ground of benefit received by the son, a bond executed by a widow in possession was held binding on the adopted son of the last zamindar, the bond having been given for debts which the adopted son as zamindar had by his acts admitted his liability to pay. (d)

The widow's authority as manager makes the son liable for necessary debts. "A son adopted by a widow is responsible for a debt incurred by her for the family during his minority." (e)

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(a) *Jummal Ali v. Tirbhee Lall Doss*, 12 C. W. R. 41. The adoption was that of a brother, but it was not a point in issue.

(b) *Narain Mal v. Kooer Narain Mytee*, I. L. R. 5 Calc. 251.

(c) *Satra Khumaji v. Tatia Hanmantrav*, Bom. H.C.P. J. 1878, p. 121.

(d) *Chetty Colum Coomara Vencatachella v. Rajah Rungasawmy Jyengar*, 4 C. W. R. P. C. 71. The Judicial Committee say—"Unless those moneys so advanced to the widow personally were advanced to pay subsisting charges on the estate or otherwise, for its advantage, they, of course, could constitute no charge on the zemindary."

(e) MS. 1678.

But he has once or twice been thought answerable merely as son for his mother. Thus an adopted son was pronounced liable for the mother's debt incurred for purposes not ascertained, he having taken her property; and as generally answerable apart from that for parents' debts. (a)

In one case the High Court of Bengal seems to have thought, that a second adopted son was liable in his estate for all debts, without distinction, incurred by the mother between the death of the first and the adoption of the second son. (b) For this the case of *Bhoobun Moyee Debia* (c) is referred to, but it does not seem to deal with any such point. It views with some doubt the possibility of an adoption where a previous son had reached an age to fulfil the ceremonial duties, (d) but nothing as to the liabilities arising should a second adoption be admitted. (e)

It was said to be a nice question, What is the effect of admission of the adopter as binding on a subsequently adopted person? (f) It would seem that such admissions made by a widow would be subject to objection if prejudicial to the adopted son or the estate. (g)

During the minority of a boy, adopted by a widow, she squandered her husband's property, contracted debts, and refused to render accounts to her son. It was held that as

(a) MS. 943. See above, pp. 164, 165.

(b) *Gobindo Nath Roy v. Ram Kanay Chowdhry*, 24 C. W. R. 183.

(c) 10 M. I. A. 279.

(d) See above, Sec. III. B. 3. 25.

(e) It is an additional argument against an adoption by a mother after the death of an adult son, that the hazard to which creditors would be exposed would greatly impede her good management of the estate.

(f) *Brojendro Coomar Roy v. The Chairman of the Dacca Municipality*, 20 C. W. R. 223.

(g) The adopted son takes by a right paramount to that of the widow and will be bound by her acts and admissions only so far as these can be ascribed to her as manager or agent. See above, p. 367.



the son was liable to pay the *bonâ fide* debts of the mother, she was liable to account to him for her management, or to pay the damages claimed. (a)

An adopted son's estate is not liable for personal debts of the adoptive mother, (b) but a sale of part by the adoptive mother, a widow, to recoup co-sharers' payments of Government land revenue, was upheld as a lawful exercise of discretion by a guardian.

The adoptive mother is the legal representative of her son, and entitled to a certificate under Act XXVII. of 1860. (c)

#### B. 2. 4.—RELATIONS BETWEEN SON BY ADOPTION AND CHILDREN BY BIRTH.

##### (a) IMMEDIATE PERSONAL RELATIONS.

The adopted son gives place to a son by birth, should there be one in the performance of the *kriya* and the *śrâddhas*. The adopted son takes a minor part in some celebrations which it is needless to give in detail. (d)

As the adopted son becomes a member of the adoptive family, the restrictions on marriage between him and female members of the family may be deemed the same as if he had been born into the place he occupies. This at least is so to three degrees from the stem, so that a woman may not be married to her first cousin by adoption. (e) Whether the prohibitions extend further is uncertain; questions on the subject are very infrequent owing to the general prejudice against the marriage of near relatives.

Should an adopted son or his widow desire to adopt, the same grounds of preference, and the same general principles would apply as if he had been born in the family of adoption. (f)

(a) *Nurhur Shamrao v. Yeshodabae*, Bellasis, Rep. 65.

(b) *Roopmonjoore v. Ramlall Sirkar*, I. C. W. R. p. 145.

(c) *Sreemutty Deeno Moyee Dossee v. Doorga Pershad Mitter*, 3 C. W. R. Misc. 6.

(d) See Datt. Chand. Sec. II.

(e) See above, pp. 937, 938.

(f) See Sec. III. and Sec. IV.

## (b) RELATIONS WITH RESPECT TO PROPERTY.

The relative rights of children by birth and by adoption in the matter of inheritance to the family estate have been discussed in Book I. (a) In relation to the adoptive mother's property as well to that of the father, the adopted son takes a right (b) subject by analogy to a partial defeasance in competition with a son by birth.

"The share of an adopted son is one-fourth of the share of a son born to the adoptive father after the adoption." (c)

The heirs of a deceased Hindû in Shahabad being a real and an adopted son; the adopted son takes one-fourth, and the real son three-fourths of his property. (d)

"If after the adoption of a boy, a son be legally begotten and born in marriage, the latter will inherit three-fourths of the father's property, the former one-fourth. The Kausubh gives the adoptee one-third or even one-half." (e)

(a) Above, pp. 369, 372 ss.

(b) Above, p. 513.

(c) *Ayyavu Muppanar v. Niladatchi Ammal et al*, 1 M. H. C. R. p. 45. As to the proportion of the adopted son see Coleb. Dig. Bk. V. T. 301 Comm; above, pp. 365, 372, 373. The begotten son cuts down the adopted to one-fourth according to Vasishtha XV. 9. In Bengal the ratio is one-third, Tag. Lec. 1880, p. 539. In the Punjab he takes equally, Cust. Law, II. 158.

(d) *Preag Singh v. Ajoodya Singh*, 4 C. S. D. A. R. 96.

(e) Steele, L. C. p. 47. "In some places, the two boys (the begotten and adopted) share all property equally; in others, the former takes two-thirds; in others, three-fourths; in others, the father, on the birth of his begotten son, gives the adoptee a present according to his ability, and separates him from the family, and in consequence he takes no share; in others, the adoptee obtains nothing without a complaint to the Sirkar. The former is entitled to management of hereditary property, and if an Enamdar or Wuttundar to the Dastkhat (right of signature), Sikka (seal), Naonagar (mark, or signature of a Patel), and other privileges of eldership." Steele, L. C. pp. 186, 187. See above, pp. 69, 738.

“After the adoption of a son, one is born to the adopter. The latter succeeds to his father’s watan.” (a) The precedence of the legitimate son by birth over the son by adoption is secured by several texts. (b)

The Dattaka Chandrika, which says that the illegitimate son of a Śūdra in competition with any heir down to the daughter’s son takes but half a share, (c) gives to the adopted son of a Śūdra an equal share in a partition made during the father’s life, and half a share in a partition after his death. (d)

A woman’s illegitimate son, it was said, takes nothing by inheritance from her in competition with her adopted son. Even her conveyance of her property to the former was pronounced invalid as against the heritable right of the latter. (e) This could hardly be maintained unless the property was that of the deceased husband; of her separate estate the widow could dispose. (f)

In one case an adoption had been contested. The adopted son took the estate and then died. It was sought to exclude from succession the son of him who had formerly denied the

(a) MS. 1739. The watan is regarded as going by preference to the head of the family, *see above*, pp. 69, 179, 736, 935; Steele, L. C. 218, 229; and as an impartible estate, so far as it supports the office, *see above*, pp. 173, 736; *Purshotam v. Mudakangavda*, Bom. H. C. P. J. 1883, p. 228.

(b) *See Datt. Mim.* IV. 26.

(c) *See above*, pp. 84, 780.

(d) Sec. V. 30. As a Śūdra father may give to his illegitimate son an equal share with his legitimate sons (*see above*, p. 775), it seems to follow that he should be able to do as much for his adopted son, though this is not provided for in the sacred writings, which do not indeed contemplate adoption by Śūdras. Strange says, that “among Śūdras . . . the after-born son and the adopted share equally the parental estate.” 1 Str. H. L. 99.

(e) 2 Str. H. L. 110.

(f) *Above*, pp. 317, 335, 370, 371, 711; 2 Str. H. L. 127.

adoption; but the Court said:—"Deendial's denial [formerly] of Munnoo's adoption *de jure*, cannot, therefore, estop his son from claiming the right of succession to Munnoo's property unquestionably acquired by him *de facto* by adoption and by no other title." (a)

A sister succeeds to the brother by adoption as to one by birth. (b)

# RELATIONS BETWEEN THE ADOPTED SON AND REMOTER CONNEXIONS BY BLOOD.

## B. 2. 5.—OF THE ADOPTIVE FATHER.

The adopted son becomes impure through deaths and births in the family of adoption, but for a shorter time than a son by birth. (c) The son adopted into a united family becomes a participator in the family sacra celebrated by the head of the family. (d) In the event of a partition after his adoption the sacra becomes dispersed, and he thenceforth offers sacrifices separately. If his father, being separated, had sacra of his own, the adopted son will naturally continue them, as even in a united family there are some services to the father's manes which devolve necessarily on the son. But if a member of an undivided family having no separate sacred fire of his own has died sonless, and then a partition has taken place causing a dispersion of the general family sacra amongst the parceners, (e) the son afterwards adopted by the widow has no share in these. He honours his adoptive father's spirit, but cannot draw back

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(a) *Sheo Sohai Misser v. Musst. Billasee*, N. W. P. S. D. R. N. S. Pt. I. 1864, p. 504.

(b) *Mahantapa v. Nilgangowa*, Bom. H. C. P. J. for 1879, p. 390.

(c) Datt. Chand. IV. 1—5.

(d) Vyav. May. Chap. IV. Sec. VII. para. 28.

(e) It is a general maxim that what was prevented at its proper season may not be taken up afterwards. See Coleb. L. and Essays, vol. II. 138.

the common sacrifices. (a) The connexion of the estate with the sacra makes this consideration important for the law of property. There is no failure of the family sacrifices while the state of union continues. Every member joins in them directly or vicariously. On a partition it were sacrilege to let them sink into abeyance, and once separately appropriated they cannot, without sacrilege, be given up.

The adopted son, though he may be partially superseded by a begotten son, yet, in the absence of such a son, takes the whole share of his adoptive father in a partition of the joint estate. (b) Nor do the Hindû authorities draw any distinction in this respect between a son adopted before and one adopted after the death of the adoptive father. Each member of a united family is replaced in the family by his son down to a partition of the inheritance. (c) From the moment of partition the son fully replaces him only in the new family thus set on foot. (d) The son adopted by a widow, ranking as posthumous, blends with the united family and takes his ideal father's interest in the estate, (e) nor can this be prevented by the existence of other joint interests which the intruder impairs by sharing them. (f) The control of the widow by the surviving brethren is an attribute of their guardianship, not of their ownership, and is itself subject to control if unfairly used according to Hindû notions. But if a partition has been made after the death of a sonless coparcener, and a provision has been made

(a) The religious duties of separated brethren are necessarily divided. *See Vyav. May. Chap. IV. Sec. VII. pp. 28, 29; Manu III. 69; Narada XIII. 37, 41, 383; Mit. Chap. II. Sec. XII. para. 3.*

(b) Above, p. 935. *Tara Mohun Bhattacharjee v. Kripa Moyee Debia*, 9 C. W. R. 423.

(c) *i. e.* so far as the great-grandson of one in actual participation. *See above, pp. 65, 66, 340, 778.*

(d) Above, p. 355.

(e) Above, p. 366.

(f) *See above, pp. 958, 961, 964.*

for his widow and daughter, (a) it seems that a subsequent adoption will not enable the adopted to reclaim his ideal father's share from those amongst whom it has been dispersed. The texts say that a proposed partition must be postponed until the result of a widow's pregnancy is seen. (b) They also provide for a redistribution in favour of an actually posthumous son. (c) But they do not say that the parceners must await a widow's election to adopt or not, or that a share must be made up for the son subsequently adopted. (d) As, therefore, there is a general rule allowing partition at the will of the existing members and explicit exceptions for two particular cases, it would be opposed to the Hindû principles of construction to admit a claim in a third case on which there is no express authority for taking the property back from its separate owners. (e)

The fact, again, of property held by one descendant or group of descendants from the same stock unshared by other descendants implies partition or separate acquisition. By an extinction of the united proprietary group the continuity and unity of ownership are destroyed. The principles of partition rather than of inheritance, as conceived by the Hindû lawyers (f), come into play, and the law distributes the property once for all to those who are at that moment

(a) See above, pp. 758, 776, 780.

(b) Above, pp. 75, 657, 847 ; Mit. Chap. I. Sec. VI. para. 12.

(c) Above, p. 792.

(d) The Śâstris in one case declared that—"Inspired legislators had made provision for the custody of the estate of minors, but neither they, nor any writer, had provided for the charge of the estate of the unborn during an indefinite time ; therefore the unborn could have no property." *Bamundoss Mookerjee v. Musst. Tarinee*, 7 M. I. A. 188. See above, pp. 67, 590. The joint estate supporting common *sacra* remains accessible to an adopted son of an undivided member until it has been divided. After this there is no authority for recovering any portion.

(e) See above, pp. 588, 590.

(f) See above, p. 600.

entitled, by a distinct transfer and a creation of new interests incompatible with any continuance of the old. The revival of an interest once extinguished is no where contemplated. The law as laid down in cases of adoption subsequent to a partition following the adoptive father's death, or to the opening of a collateral succession, seems thus quite in accordance with Hindû principles. In the two cases immediately to be cited it does not appear that the distinction between the divided and the undivided family was kept quite clearly in view. In these there had not been a partition, and the family still admitted of increase by adoption. An adoption made by a widow will not, it was said, divest the surviving joint sharers with her late husband's father of any part of the property, nor when his father was separated will it divest the deceased husband's sisters of their succession to their father, unless made in either case with the assent of the persons entitled. (a) Property vested in one of two united brothers by the death of the other, it was said in *Gorind Purshotam v. Lakshmibai*, (b) cannot be divested by the subsequent adoption of a son to the deceased. In the absence of a partition it would seem that the adopted son must take his father's place, as in *Sri Raghunada's* case.

An adopted son succeeds collaterally as well as lineally (c) to ancestral property. (d) But though an adopted son

(a) *Ramchandracharya v. Shridharacharya*, Bom. H. C. P. J. 1881, p. 145. See above, p. 995.

(b) Bom. H. C. P. J. 1882, p. 12.

(c) *Sham Chunder et al v. Nuraines Dibeh*, 1 C. S. D. A. R. p. 209; *Sumboochunder Chowdry v. Naraini Dibeh*, 3 Knapp, p. 55; S. C. 5 C. W. R. p. 100 P. C; *Gour Hurrie Kubraj v. Musst. Rutnasuree Debia et al*, 6 C. S. D. A. R. p. 203; *Tara Mohun Bhuttacharjee v. Kripa Moyee Debia*, 9 C. W. R. 423; *Lokenath Roy et al v. Shamsonduree*, Beng. S. D. A. R. for 1858, p. 1863.

(d) *Gokul Chund v. Narain Dass*, N. W. P. R. 1862, Pt. I. p. 47.

succeeds collaterally as well as lineally, (a) his right, it is said, vests for this purpose only from the adoption, (b) *i. e.* the widow till then can sue in her own right. Nor can he retrospectively take away what passed to another through his non-existence or non-adoption when the succession opened. (c)

In a leading case the Judicial Committee said:—

“Their Lordships think, therefore, looking at these authorities, (d) and the weight that is due to them, that an adopted son succeeds not only lineally but collaterally to the inheritance of his relations, and, if so, these appellants are not in a condition to succeed, because they have distinctly admitted in their own pleadings, and by the answer of their own pleaders given to the Court, that an adopted son of the brother by the whole-blood was in existence at the time of their suit being commenced. If an adopted son of the whole-blood is in the same situation as the natural son of the whole-blood, then the only remaining question is whether the son of the brother of the whole-blood succeeds in preference to the sons of the brother by the half-blood; and upon that point there is no dispute, for the authorities are uniform.” (e)

(a) *Sumboochunder Chowdry v. Naraini Dibeh*, 3 Knapp, 55.

(b) *Bamundoss Mookerjee v. Musst. Tarinee*, 7 M. I. A. 169. See above, A. 5.

(c) *Musst. Bhoobun Moyee Debia v. Ram Kishore Acharj*, 10 M. I. A. 279.

(d) See Mit. Chap. I. Sec. XI. pp. 30, 31; Suth. Syn. Head IV. Coleb. Dig. Bk. V. TT. 184, 217 Comm.

(e) *Sumboochunder Chowdry v. Naraini Dibeh*, 3 Knapp. Pr. Co. 61-62. See Mit&ksharâ, Chap. II. Sec. IV. paras. 5 and 7; Daya-Bhaga, Chap. XI. Sec. VI. para. 2. “Can a son given be heir to a kinsman, or not? . . . A text of Manu shows, that a son given, being endowed with every virtue, shall take the heritage.” Coleb. Dig. Bk. V. T. 277 Comm.



That an adopted son of a whole-brother is preferred to a natural son of half-brother, (a) follows from the principles stated in the earlier part of this work. It will be noticed too that in a case between separated brothers and their sons, the latter do not represent their predeceased father in succession to his post-deceased brother, or take so long as another brother survives. Much less, therefore, would an adopted son take back any part of the succession thus disposed of before he was adopted. In the case of a daughter's son, as he is not by his birth, nor therefore by his adoption, a co-owner with his maternal grandfather whose proprietary personality could thus be conceived as persisting in him, he cannot take back the estate from those to whom the law before his existence has given it. This is the application of the general principle made by the Śâstris at 7 M. I. A. p. 188. In Bombay the daughter herself would succeed in the case supposed, and then supposing her father had had an undivided brother predeceased, the question would arise of whether the daughter's existence was a bar to adoption by the widow of the first deceased brother, or to the succession of the son thus taken. There is not the slightest Hindû authority for saying that the adoption could not be made; and when made it would react so as to put the boy adopted in the place held by his adoptive father in the undivided family. A daughter, though she inherits, does not continue the estate and the sacra as a son or a widow does. (b) Her existence is no bar to adoption, and in the case supposed the right to adopt a fit person would subsist though she were a son.

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(a) See above, pp. 111, 112, 372. The Mitâksharâ gives the succession to the half-brother in preference to the whole brother's son, but still the latter precedes the son of a half-brother. The Judicial Committee placed the right of the adopted son on his becoming "for all purposes the son of the [adoptive] father." See Rep. p. 60.

(b) See above, pp. 93, 129, 130, 872.

In the case of collaterals generally, the nearest or those who are equally the nearest of the nearest kin succeed. Amongst them too there is no waiting for the possible birth of a posthumous son, who, if already born would precede those in existence. (a) The widow of a gotraja sapinda under the Bombay law intercepts the estate for her unborn child, but amongst the Bandhus the principle of interpretation adopted by the Vyavahāra Mayūkha (b) would shut out a child from succession, though when born, the nearest to the propositus, if his birth followed instead of preceding the opening of the succession. Similarly in the case of a son adopted: he can retroactively continue an estate, but cannot recover one given to others prior to his adoptive existence. If his mother has succeeded as representative of her husband's line, he as son can supersede her: if she has not, he cannot supersede others whose personality is not identified with his adoptive father's. (c)

That the estate which has once passed away to a separated collateral cannot be affected even in part by a subsequent adoption is strongly shown by the case of *Nilcomul v. Jotendro Mohun Lahuree* (d) where even a postponement of adoption procured by fraud was allowed to prevent the adopted boy, as a collateral, from defeating the intermediate collateral succession of the guilty party.

In the case of collateral succession to the property of separated branches or members of a family, there is no rule reducing the share of an adopted son in competition with a

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(a) Comp. p. 577, Q. 2, Rem. 2; p. 581, Q. 8, Rem. 1.

(b) Above, p. 491.

(c) In the event of a property falling in collaterally to a branch united in itself, this inheritance would be taken by the then existing members to the exclusion of a son afterwards adopted by a widow of a predeceased member of the group. Such at least is the view that seems most conformable to principle for the reasons set forth above, pp. 702, 715; but the matter as shown there is one of controversy amongst the Hindū lawyers.

(d) Above, pp. 368, 396.

son by birth. The rule applies in terms only to the patrimony in which interests are acquired by birth and by adoption, not to an estate passing through default of cosharers to a collateral line. The adopted son is a sapinda, (a) equally with the son by birth, and the analogy of the equality of the half-blood with the full-blood in the case of sapindas not specifically provided for, (b) may fairly be extended to the adopted son. As the collaterals in the adoptive family inherit equally from him as from a son by birth, so should he inherit from them equally with a son by birth.

An adopted son of a coparcener excluded on account of blindness, &c., from a share in a partition is, according to the Dattaka Chandrika, entitled to maintenance. (c)

A niece's son adopted by her paternal uncle was pronounced entitled to the management of business as managing Patel, while the widow of the deceased nephew was pronounced heir to his property. (d) (Nothing is said of the caste or of division or non-division. Division and Śūdra caste seem to be assumed.)

"An adopted son is not precluded from inheriting the estate of one related lineally, though at a distance of more than three generations from the common ancestor." "The rights of an adopted son, except in a few instances precisely defined in the Dattaka Chandrika and the Dattaka Mimāṃsa by express texts, are in every respect similar to those of a natural born son. The adopted son succeeds to the sapinda kinsmen of his father, and as regards the sapinda relationship, there is no difference between the adopted and natural born son." (e)

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(a) Above, pp. 114, 116, 463.

(b) Above, p. 125.

(c) Sec. VI; 1.

(d) MS. 5.

(e) *Puddo Kumaree v. Juggut Kishore*, 1. L. R. 5 Calc. 615; in appeal S. C. L. R. 8 I. A. 229; *Mokundo Lal Roy v. Bykunt Nath Roy*, 1. L. R. 6 Calc. 289, quoting *Tara Mohun Bhattacharjee v. Kripa Moyee*, 9 C. W. R. 423. See above, p. 938. Sutherland, 2 Str. H. L. 116,

In Bengal, it has been held that an adopted son succeeds to the property of a son of his sister by adoption. (a)

One adopted succeeds another as nearest collateral relative. (b)

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RELATIONS BETWEEN THE ADOPTED SON AND  
REMOTER CONNEXIONS BY BLOOD.

B. 2. 6.—OF THE ADOPTIVE MOTHER.

As to the succession of an adopted son to property in right of a connexion through his mother with her family of birth (c) the decisions have differed. (d) In *Chinnaramakristna Ayya*

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says, he (the adopted son) inherits collaterally as well as lineally according to the *Mitāksharā*, notwithstanding passages in *Datt. Mīmāṃsa* and *Datt. Chandrika* limiting his sapindaiship to three degrees.

(a) *Puddo Kumaree Debee v. Juggut Kishore Acharjee*, I. L. R. 5 Calc. 615.

(b) *Gour Hurrie Kubraj v. Musst. Rutnasuree*, 6 C. S. D. A. R. 203; *Sham Chunder et al v. Naraiani Dibe*, 1 C. S. D. A. R. 209.

(c) See above, pp. 487 ss. "In a case where the right is not dubious, the funeral cake shall be offered by a daughter's son to his maternal grandfather, although he do not claim the estate and family." *Coleb. Dig. Bk. V. T. 276 Comm.*

(d) Under the Roman Law as adoption did not make the adopted a cognate of his father's cognates; the mutual rights of inheritance were restricted to those connected as agnates. With the adoptive mother's family he had no connexion to form a basis for mutual rights. (See *Willems, Dr. Pub. Rom.* p. 87; above, p. 936.) Justinian's rule under which the adopted son remained in the family of his birth corresponded to the preference long established by practice of the marriage without "Manus" to that accompanied by "Manus." The Roman wife in the later ages remained a member of her father's family. She did not become a member of her husband's family. It was, therefore, most natural that her husband's adopted son whose connexion even with the adoptive father's family was limited to the agnates should have none at all with hers. The mutual rights of succession between mother and child rested on special laws. See *Ortolan, Inst.* § 152. *Willems, Dr. Pub. Rom.* p. 77.

v. *Minnatchi Ammal* (a) he was refused the place of a daughter's son as heir to her father's property. The P. Sadr Amin had decided in his favour on the authority of the Dattaka Mīmāṃsa, but the High Court set him aside in favour of the grandson of a brother of the adoptive mother's father. The latter is by the Madras High Court ranked as a Bandhu. According to the Mitāksharā he is a gotraja sapinda of the propositus, but would still rank after the daughter's son; but the Madras decision denies to the adopted son any right at all as a grandson to his mother's father.

In the North-West Provinces on the other hand it was held, in *Sham Kuar v. Gaya Din* (b) that the adopted son succeeds to the property inherited by his adoptive mother from her father, and as the doctrine of a mere life estate being taken by a female heir prevails there (c), the adopted son must have been thought a competent heir to his maternal adoptive grandfather.

In Bengal a decision precisely the reverse had been given in *Gunga Mya v. Kishen Kishore Chowdry*. (d) In *Teen-cowree Chatterjee v. Dinonath Banerjee* (e) it was ruled, that to his adoptive mother's stridhan the adopted son succeeds in the absence of daughters. It had previously been held that *Gunga Mya's* case was not conclusive, and that where an adopted son was the propositus, the maternal relatives inherited from him as from a son by birth. (f) This would seem to establish a reciprocal connexion by which the adopted son ought in his turn to benefit, but such a doctrine

(a) 7 M. H. C. R. 245.

(b) I. L. R. 1 All. 255.

(c) See above, p. 332.

(d) 3 C. S. D. A. R. 128.

(e) 3 C. W. R. 49.

(f) *Gangapersad Roy v. Brijessurree Chowdhraïn*, 15 S. D. A. R. 1091. See above, pp. 489 ss.

was denied in *Moun Moyee Debeah v. Bejoy Kishto Gosave*, (a) and it was by this case that the Madras Court was governed in that of *Chinnarama v. Kristna Ayya*. The text of Manu is very explicit in giving the right only to a son begotten by the daughter's husband, (b) and the "daughter's son" in Vishnu (c) probably had no other in view. But as the adopted son now makes oblations to his adoptive mother's male ancestors (d) the connexion may logically be attended with mutual rights of inheritance, as in the case of a daughter's son by birth. (e)

The question came before the Judicial Committee in *Rani Anand Kunwar v. The Court of Wards*, (f) but their Lordships did not pronounce upon it. The High Court of Bengal, however, has recently held that, according to Hindû law, an adopted son takes by inheritance from the relatives (father and brother) of his adoptive mother in the same way as a legitimate son. (g) A similar opinion has still more recently been expressed by the Judicial Committee in *Kali Komul Mozoomdar v. Uma Sunkar Moitro*, P. C., 30th June 1883. Their Lordships say:—"As to the second question, their

(a) W. R. F. B. 121. Sec 1 Hay, 260.

(b) Above, p. 447.

(c) Above, p. 446.

(d) See Coleb. Dig. Bk. V. T. 275 Comm.

(e) Above, pp. 444, 491.

(f) I. L. R. 6 Calc. 764; S. C. L. R. 8 I. A. 14.

(g) *Uma Sunkar Moitro v. Kali Komul*, I. L. R. 6. Calc. 256. "It is, therefore, clear, that the adopted son confers the same spiritual benefit upon the relatives of his adoptive mother as a legitimate son does, and that he is cut off from the inheritance of the relatives of his original mother. That being so, it would accord with the dictates of natural justice, as well as with the principles upon which the Law of Inheritance in the Bengal School is based, to hold that an adopted son succeeds to the property of the relatives of his adoptive mother in the same way as a legitimate son." (Jud. Cit. p. 262.) This is approved and followed in *Surjokant Nundi v. Mohesh Chunder Dutt Mozoomdar*, I. L. R. 9 Calc. 70.

Lordships' have held in *Pudma Coomari Debi v. The Court of Wards*, (a) that an adopted son succeeds not only lineally, but collaterally, to the inheritance of his relatives by adoption. In that case the claimant was the adopted son of the maternal grandfather of the deceased, and it was argued for the appellant that it was distinguishable from this case. But their Lordships laid down that an adopted son occupies the same position in the family of the adopter as a natural born son, except in a few instances, which are accurately defined both in the *Dattaka Chandrika* and *Dattaka Mīmāṃsa*. That this is the Hindū law is shown by the careful examination of the authorities by the learned Native Judge who delivered the judgment of the Full Bench of the High Court, which is the subject of this appeal. The respondent claims to succeed as being the daughter's son, and consequently the heir of his maternal grandfather at the death of his widow, which he would be if he were a natural born son, and as an adopted son he is in the same position. This is clear from the *Dattaka Mīmāṃsa*, Sect. 6, p. 50, where it is said, 'The forefathers of the adoptive mother only are also the maternal grandsires of sons given and the rest, for the rule regarding paternal is equally applicable to maternal grandsires (of adopted sons).' Their Lordships are, therefore, of opinion that the decree of the High Court in favour of the respondent is right."

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I. 2.—IMPERFECT ADOPTION UNDER THE ORDINARY  
LAW. (b)

The law of the Śāstras, or what was supposed to be so, (c) has practically been superseded by the customary law and

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(a) L. R. 8 I. A. 229.

(b) See Sec. VI. A. 5. Should no adoption be attempted the estate descends as if none were intended. See Sec. VIII. and 2 Str. H. L. 90.

(c) Above, pp. 935, 936.

the decisions of the Courts as to the status of a boy defectively adopted. These decisions are of course authoritative so far as they extend. Still it may be useful to consider what the Hindû lawyers have said as to the consequences of an imperfect adoption as affecting the relations between the adopted and the family of birth and the family of adoption, and the view taken of his relations as a grantee of public lands or endowments.

The customary law is thus stated :—

“Adoptions may be annulled if made contrary to caste custom. Several of the caste inquire into the irregularity complained of, and their decision is carried into effect (whether declaring the validity or annulment of the adoption).” (a)

“In such case the separating adopted son might take a small share ( $\frac{1}{10}$ th) without being chargeable with the payment of his adoptive father’s debts.” (b)

#### I. 2. A.—RELATIONS TO THE FAMILY OF BIRTH.

An adoption may have been imperfect in the sense of not constituting the proposed relation or, in having failed merely in some unessential particular not impairing its jural effect. The Hindû lawyers recognize an intermediate result, where the gift has been so far completed as to sever the child from his family of birth, but the acceptance in adoption has not been so made as to make him a member of the adoptive family. (c) This status of the adopted is of only theoretical interest; both the castes and the Courts, as we have seen, refuse to acknowledge a parting from the one family without a union to the new one.

(a) Steele, L. C. App. p. 388.

(b) Steele, L. C. App. pp. 389, 390.

(c) The gift alone severs connexion with the family of birth, even if the rites are insufficient to establish a connexion with the family of adoption. (Datt. Chand. II. 19, 20; see 2 Str. H. L. 122.)



The rights of a man in his family of birth remain unaffected, when his adoption has been invalid. (a)

### I. 2. B.—RELATIONS TO FAMILY OF ADOPTION.

To disqualify for sharing in a partition leprosy or the like defect must have arisen previous to division; but if succession is once vested exclusively in the others, it is not divested by adoption (b) on the part of the disqualified man whose share has been appropriated. It seems that such persons cannot themselves adopt, but that sons already adopted are entitled to a provision for their maintenance. (c) Custom sometimes allows a vicarious adoption. (d)

When an adoption of a son has once been absolutely made and acted on, it cannot be declared invalid or set aside at the suit of the adoptive father. A cancellation of adoption might, it was ruled, be based upon the grounds—(1) The adoption was not in the manner and according to the ceremonies required by Hindû law; (2) The boy was not a fit and proper person to perform the plaintiff's obsequies or to make offerings for the benefit of the souls of the plaintiff's ancestors, being devoid of education and religious knowledge and principles, and the associate of thieves,

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(a) *Bhawani Sankara Pandit v. Ambabai Ammal*, 1 M. H. C. R 363, 365; above, p. 936. "Examples of irregularities justifying annulment are: adoption of a father's brother or sister's son, or an elder than the adopter, or of a boy without the necessary consent, or of a boy who is a cripple, or disabled in senses or understanding." Steele, L. C. App. p. 388. As to a defective gift being null, 2 Str. H. L. 433; H. H. Wilson, Works, vol. V. p. 73.

(b) *Sevachetumbara Pillay v. Parasucty*, M. S. D. A. R. for 1857, p. 210; 1 Str. H. L. 163. Above, p. 992.

(c) See above, Sub-sec. I. 1 B. 2. 5, and pp. 579, 587, 751, 752, 880. The son adopted when the adopter was competent, as before he was afflicted with leprosy, ought on general principles to take his father's place as though the father had died. See above, pp. 154, 577.

(d) See above, p. 581.

gamblers, and women of immoral character ; (8) He failed to perform his part of an agreement or compromise in writing entered into by him with the plaintiff. (a)

An absolute disqualification of the boy, the performance of the ceremonies of adoption on a boy of a different caste, or the omission of them in adopting a boy of a different gotra, (b) is variously said to make the adoption null, while severing the boy from his family of birth or to constitute an adoption of an inferior kind. According to either view the boy defectively adopted is entitled to maintenance on the footing of a *dâs* or slave. (c) The gift alone is supposed to sever him completely from his family of birth. (d) The authority last cited makes the performance of the ceremonies by the adoptive father effectual to release even a tonsured son from connexion with his family of birth, and to raise him from the servile rank to that of a son to the adoptive father. (e) It would now probably be held that there must be the proposed change of status or none at all, and that failing a complete adoption, the boy must remain a member of his family of birth. (f) The gift or sale, which formerly gave a good title to the purchaser as owner of a slave, can no longer operate since the passing of Act V. of 1843. (g) The doctrine of a complete gift and acceptance as son being sufficient, and the attendant ceremonies only incidental, not absolutely essential, gets rid of many difficulties arising from the precepts just

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(a) *Sukhbasi Lal v. Guman Singh*, I. L. R. 2 All. 366. Above, pp. 944, 946.

(b) Datt. Mīm. V. 56.

(c) See Steele, L. C. 46, 184; Datt. Mīm. Sec. III. 2, 3; Sec. IV. 40 ss.; Coleb. Dig. Bk. III. Chap. I. T. 29, 33 Comm.; Bk. V. T. 182, 273, 275 Comm.

(d) Datt. Chand. Sec. II. 19.

(e) See *ib.* para. 27.

(f) See Coleb. in 2 Str. II. L. 223; Steele, L. C. 388. Comp. Just. Inst. Bk. I. T. XI. 2; and Ortolan, § 138.

(g) See 2 Str. H. L. 221, 224.

considered. (a) That there cannot be a complete gift without complete acceptance, *see* the Viram. Transl. pp. 33, 35, and comp. Datt. Mīm. Sec. IV. 3. The work last cited specifies a gift, acceptance, and burnt offering as indispensable, (b) and with this, as to Brāhmanas, custom seems to agree. (c) Colebrooke explains the slavery incurred by the quasi-adopted as servitude only of that highest kind from which a man frees himself by resigning his right to subsistence. (d) The servitude indeed could not be more than nominal, seeing that though the son irregularly adopted was not entitled to succeed or to share the patrimony, his adoptive father was bound to get him married, and so set him up as a householder. (e)

If one of a different caste has been adopted, the authorities exclude him from any share in the patrimony, but declare him entitled to maintenance, (f) a right which arises in every case of severance from the family of birth without complete acceptance into that of adoption. Thus "in case of discovery that the boy being of another gotr, was not adopted with [the regular] ceremonies, or that he was of another

(a) *See* Coleb. Dig. Bk. V. T. 273 Comm.

(b) *See* Sec. V. 56.

(c) Steele, L. C. 184.

(d) As to this, *see* Coleb. Dig. Bk. III. Chap. I. T. 29, 48; 2 Str. H. L. 223, 226, 228.

(e) Datt. Mīm. Sec. V. 45, 46; Datt. Chand. Sec. II. 18; Sec. VI. 3, 4; MS. 1744. The earlier Roman law required both a *mancipatio* to transfer the son from his family of birth, and a *vindicatio* or claim to him by the adoptive father as son to make a complete adoption. This *vindicatio* had to take place before a judicial officer, whereby formality and publicity were secured. *See* Ortolan, Inst. § 133 Note, § 140. Later the requisite sanction was derived either from an imperial rescript for the case of one *sui juris* or an order of a judge for one *alieni juris*. *Ib.* §§ 136, 137.

(f) Datt. Mīm. Sec. III. 1—3.

caste, the adoption is null and the boy is to receive maintenance as a dās or slave.” (a) A Smṛiti passage frequently repeated says : “ If a doubt arises as to a remote kinsman (adopted) i. e. as to his qualifications, the adopter shall set him apart like a Śūdra.” (b)

The decisions recognizing the particular status we are now considering have been very few. In one it was held that a Hindū invalidly adopted is entitled to maintenance in the adoptive family. (c) In another case it was ruled that the adopted son of one whose adoption has been held invalid, cannot claim through the right of his adoptive father to be maintained by the alleged adoptive grandfather. (d)

The Śāstris treat this semi-adoption as a living institution, as in the following answers :—“ A son illegally adopted had,” it was said, “ a right to maintenance and marriage expenses.” (e) “ A boy adopted after his chūḍa and other sacraments becomes a dās entitled only to such property as may be conferred on him by gift.” (f)

(a) Steele, L. C. p. 46.

(b) Vas. XX. 7.

(c) *Ayyāvu Muppanār v. Niladaṭchi Ammal*, 1 M. H. C. R. 45.

(d) *Bawāni Saṅkara v. Ambabāy Ammal*, 1 M. H. C. R. 363. The adopted father's adoption had been pronounced invalid on the ground, that the widow adopting had not authority from her husband.

(e) MS. 1744. See above, p. 935. He is put on an equal footing with an illegitimate, and “ the father is obliged to support his natural son, he performing the duties of a servant.” Steele, L. C. p. 179.

(f) MS. 1674. The Śāstri, 2 Str. Hindū Law, 121, speaks of a Nitya Datta or permanent adoption, and an Anitya Datta or temporary one, and this, as he explains, depends on the performance or non-performance of the upanāyana before adoption. Colebrooke says, the son of such a dyvāmushyāyana belongs to the family of his father's upanāyana (and consequent gotraship).

The British Courts, rejecting generally any distinction except that of belonging to the one or the other family, regard an essentially defective adoption as no adoption. Thus it was said, an authority to adopt "must be strictly pursued, and, as the adoption is for the husband's benefit, so the child must be adopted to him and not to the widow alone. Nor would an adoption by the widow alone for any purpose required by the Hindú law give to the adopted child, even after her death, any right to the property inherited by her from her husband." (a) An attempt was made in one case to establish the principle, that an adoption incompetent to the person who made it through the existence of a representative of the family and estate might, on the removal of this person by death, acquire the validity it would have had in the absence of the obstacle at the time when it was made. (b) In *Bhoobun Moyee's* case (c) it was ruled, that a power to adopt could not be exercised after the death of the natural son leaving a widow. This in a later case (d) was interpreted as meaning that the adoption was absolutely invalid, not merely ineffectual to deprive the son's widow of her estate by succession to the deceased son her husband. (e) The argument of the High Court of Calcutta that the adoption, though ineffectual as against the son's widow, became effectual on her death, and made the adopted

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(a) *Chowdry Pudum Singh v. Koer Oodey Singh*, 12 M. I. A. 350, 356.

(b) The nearest analogy perhaps would be the setting up of a bigamous marriage amongst Christians, as validated by the subsequent death of the obstructive spouse. The adoption of a son in the lifetime of another is not validated by the death of the latter. See above, p. 945.

(c) 10 M. I. A. 279.

(d) *Pudma Coomari Debea v. The Court of Wards*, L. R. 8 I. A. 229.

(e) An opinion of Colebrooke to precisely the same effect, even where the adopted was a nephew of the deceased adoptive father is given at 2 Str. H. L. 93.

son, then a brother by adoption of her deceased husband, was rejected by the Judicial Committee. The elder widow could not indeed give effect by acquiescence or ratification to that which was absolutely void; and the so-called adopted son was held not to have taken any rights. (a) In Bombay the son's widow would, unless he had intimated his dissent, have had a right to adopt to him as a separated Hindû, (b) and with his authority, or the sanction of his united brethren, if he was unseparated. (c) But as in Bengal the mother armed with authority from her deceased husband could not adopt (d) after the estate and the sacra had wholly centred in her son by the completion of his saṃskâras, (e) neither in Bombay could she by such an authority, or by a mere implied authority drawn from her son, adopt so as to withdraw the son's property from him to whom the law had intermediately given it. (f) It is the widow and she only who continues her husband's spiritual existence, (g) and can replace him at any moment by an adopted son, (h) subject in a united family to the assent of the surviving male members on account of her religious subordination to them. (i)

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(a) L. R. 8 I. A. 229.

(b) Above, pp. 971, 984, 990.

(c) Above, p. 986.

(d) This seems to be the correct doctrine. See above pp. 984 ss. But the rule has not been judicially laid down. Comp. *V. V. Krishna-rao v. Venkatrama Laxmi*, I. L. R. 1 Mad. at p. 187.

(e) As to the theory advanced in *Ram Soonder Singh v. Surbanee Dosses*, 22 C. W. R. 121, see above, Sub-sec. I. 1. B. 2. 2. No adoption is approved by the Hindû law over an initiated man's head, even when he has migrated to the other world. Even a single adoption may be replaced by a widow's sacrifices and austerities. See above, pp. 873, 1148, and Coleb. Dig. Bk. IV. Chap. III. Sec. II.

(f) Above, p. 984. Sutherland, in 2 Str. H. L. 94, denies that a mother can adopt for a son.

(g) Above, pp. 93, 420.

(h) Above, pp. 972, 984.

(i) Above, p. 986.

## I. 2. C.—RELATION AS A GRANTEE.

It may be gathered from what is said of the customary law in Steele, L. C. 183, that under the native system an adoption would not in general be recognized by a sovereign or the grantor of an estate as imparting a right of succession to it without the superior's consent being gained. (a)

An adopted son can succeed to his father's jagir, but if he rests his title to succeed on a confirmative sanad, he is bound, it was said, to prove it. (b)

## II.—CONSEQUENCES OF ADOPTION OR QUASI-ADOPTION NOT GOVERNED BY THE ORDINARY LAW.

## II. A.—VALIDITY RECOGNIZED.

## A. 1.—WITHOUT LIMITATION (SAVE BY AN EXCEPTIONAL LAW).

"By agreement at the time of adoption a boy may represent both fathers. But without this he cannot succeed to his natural father's property." (c)

"If a Brâhman adopts a son of a different gotra the boy is to be regarded as a dvyâmushyâyana, not as a legal son of the adopter. If the boy's chaul and munj have been performed he becomes a dâs entitled only to maintenance. But he may perform the adoptive father's Śrâddha and succeeds in the absence of [a begotten] son, widow, and other near relatives." (d)

"A boy adopted from a different gotra after his munj becomes a dvyâmushyâyana," which the Śâstri describes as one "bound to observe the prohibitions as to marriage applicable to both families." (e)

(a) See above, pp. 955, 1009. Comp. Blackst. Comm. Bk. II. Ch. 4, as to the feudal succession, recognition, and relief.

(b) *Maharajah Juggurnath Sahaie et al v. Musst. Mukhun Kooncur*, 3 C. W. R. 24 C. R.

(c) MS. 1692. See above, pp. 896 ss, 1041 ss.

(d) MS. 1675.

(e) MS. 1674. The boy would generally be dvyâmushyâyana merely because he could not properly be given except as a dvyâmushyâyana.

A dvyâmushyâyana does not take the name of his adoptive father. (a)

When an only son is adopted he succeeds to his natural as well as to his adoptive parents (b) if taken as a dvyâ-mushyâyana. The effect by the Hindû law of an adoption as a dvyâmushyâyana (son of two fathers) is not to deprive the adopted son of his lineage to his natural father, or to bar him of his right of inheritance to his father's estate. (c) But in Bombay he does not inherit from his real father except in the absence of other sons. (d)

## II. A.—VALIDITY RECOGNIZED.

### A. 2.—WITH LOCAL LIMITS.

A kṛitrima son adopted by a male inherits, it was said, in both families; (e) and similarly it was said that "one adopted by the kṛitrima form, which is in use in Behar, Tirhoot, &c., takes the inheritance both in his own family and in that of his adoptive father." (f)

(a) *Musst. Edul Koonwar v. Koonwar Debee Singh*, 5 N. W. P. Dec. 341.

(b) *Nilmadhv Doss v. Biswambar Doss*, 12 C. W. R. p. 29 P. C.; S. C. 3 Beng. L. R. p. 27 P. C.; S. C. 13 M. I. A. 85. The Judicial Committee say:—"Again, if there is, on the one hand, a presumption that Gorooproshad Doss would perform the religious duty of adopting a son, there is, on the other, at least as strong a presumption that Purmanund would not break the law by giving in adoption an eldest or only son, or allowing him to be adopted otherwise than as Dvyâ-mushyâyana, or son to both his uncle and his natural father."

(c) *Nilmadhv Doss v. Biswambar Doss et al*, 13 M. I. A. 85. See above, p. 899.

(d) See above, p. 898.

(e) *Musst. Deepoo v. Gowreesunkur*, 3 C. S. D. A. R. 307. See above, p. 1015. The kṛitrima adoption like that of a pālak putra bears a pretty close resemblance to the Roman adoption in its latest stage. See above, pp. 925, 926.

(f) *Srinath Serma v. Radhakant*, 1 C. S. D. A. R. 15.



With regard to *kṛitrīma* adoptions it has further been ruled that—A person adopted by the husband stands to him in the relation of a son, and is heir to his estate; but does not become the adopted son of the adoptive wife, nor succeed to her peculiar property. (a)

Nor does the person adopted by the wife, as her son, become the adopted son of her husband, or succeed to his property, even by the Maithila *shāsters*, though the adoption should have been permitted by the husband. But, as her son, he will succeed to her property. (b) But if the husband and wife jointly appoint an adopted son, he stands in the relation of a son to both, and is heir to the estate of both. (c)

When an adoption has been made in the *kṛitrīma* form, the sons of the adopted have no right to set aside alienations which the adoptive father of the adoptee made of his self-acquired property for alleged illegitimate purposes. (d)

A son, adopted by a widow without her husband's permission, has no right to her property until her death. (e)

## II. A.—VALIDITY RECOGNIZED.

### 3.—AMONGST CERTAIN CLASSES.

Among the Talabda Kolis of Surat, the son adopted according to their fashion celebrates his adoptive father's obsequies with a feast, and succeeds him. His adoptive father may dispose of his property as he pleases, but failing this the adopted son succeeds. (f)

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(a) *Srinarain Rai et al v. Bhya Jha*, 2 C. S. D. A. R. 27.

(b) *Ibid.*

(c) *Ibid. Collector of Tirhoot v. Huopershad Mohunt*, 7 C. W. B. 500.

(d) *Baboo Banee Pershad v. Moonshee Syud Abdool Hye*, 25 C. W. R. p. 192.

(e) 2 Hay, 410. This of course implies where she has a right, Otherwise the adoption would be invalid for all purposes. See above. I. 2 B.; 2 Str. H. L. 91.

(f) *Bhala Nahana v. Parbhu Hari*, I. L. R. 2 Bom. 67.

An adoptive father may, according to the custom of the Talabda Koli caste, repudiate an adopted son for such reasons as would justify a natural father in disinheriting his son. (a)

## II. B.—VALIDITY NOT RECOGNIZED.

### 1.—OBSOLETE.

A person cannot succeed as adopted son of a daughter who has brothers alive, and who cannot be an appointed daughter if she had brothers when she married, nor can he succeed as claiming under a bought son. (b)

One sold or given by his parents or by himself ranks as a slave according to Manu quoted by Jagannātha in Coleb. Dig. Bk. III. Chap. I. Sec. I. T. 33 and Commentary. Attempts to procure a son in this way are thus made abortive in the present age.

### B. 2.—ADOPTION PARTLY ASSIMILATED TO THAT UNDER THE ORDINARY LAW.

Two brothers attempting to adopt the same sons declared—"According to our Śāstras the said two adopted sons will perform our obsequies, and shall become successors of our ancestral and self-acquired property." Though this showed an intention to make and take a gift, yet it was pronounced inoperative if the persons did not fulfil the character of adopted sons. (c)

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(a) *Bhala Nahana v. Parbhu Hari*, I. L. R. 2 Bom. 67, 70.

(b) *Yachereddy Chinna Bassavapa v. Yachereddy Gowdapa*, 5 W. R. P. C. 114.

(c) *S. Siddesory Dossee v. Doorgachurn Sett*, 1 Bourke, 360. The Datt. Mīm. Sec. I. 30 says the same person cannot be adopted by two, but caste custom seems to have recognized it in a few instances in Central India. And the Datt. Mīm. II. 47, 49, allows the adoption of one son (a nephew) by several united brothers, on the principle that the son of one is in a sense the son of all.

“A person taken as pupil by a Gosavi cannot on his natural father's death claim a debt due to the latter.” (a)

### B. 3.—MERELY ANALOGOUS.

A son-in-law having been adopted succeeded to the estate. It was attached for the debt of the adoptive father. The Sâstri said that the adopted son's son by a wife not his adoptive father's daughter had no claim to raise the attachment. (b)

The Hindû law does not recognize any legal status for the foster-son, either in the matter of performing ceremonies or of inheritance. (c) “Nephews, though separated, inherit before a mere foster-son.” (d)

(a) MS. 1248.

(b) MS. 31. If there was a true adoption, the son-in-law would transmit to his son the same rights as if he had been a son by birth. Probably the case was one like an Illatam adoption in Madras, *see above*, p. 421. Amongst the Motati Kapus, a low caste in Madras, an affiliation is allowed of a son-in-law in the absence of a begotten son. He takes the place of such a son in succession, and shares equally with one born after his affiliation. The question of his resembling an adopted son in other respects than for the purpose of succession was not decided, *Hanumantamma v. Râmi Reddi*, I. L. R. 4 Mad. 272, 274. Similar customs are recognized by some of the Bombay castes; thus—“Should a man have a daughter and no son, he may give her in marriage to a gharjawâhee, who is invested with the management of the house and property, but who becomes proprietor only of such property as his father-in-law gives him at his marriage, or with the consent of his other relations.” Steele, L. C. App. p. 358.

(c) *Bhimana Gaudu v. Tayappa*, M. S. D. A. R. 1861, p. 124; *Samy Josyen v. Ramien*, M. S. D. A. R. 1852, p. 60; *Nilmadhub Doss v. Biswambhar Doss*, 12 C. W. R. P. C. 29; S. C. 3 B. L. R. P. C. 27; S. C. 13 M. I. A. 85; *Kalee Chunder v. Sheeb Chunder*, 2 C. W. R. 281. *See above*, p. 925.

(d) MS. 119. The Sâstri, *above*, p. 1015 (e), allowed that a foster-son might be heir by custom; and amongst Sûdras he was in one instance given a place in the family. *See above*, p. 381, Q. 10.

“A *pālak putra* is not entitled to share in any property *de jure* (a) generally in the Dakkhan; but in a few cases, such as the one above, p. 373, Q. 18, the Śāstris have been more indulgent. In the case at 2 Str. H. L. 426, the Śāstri so far assimilates the foster-son to an ordinary son, that he says a gift may be made to him in his absence without delivery of possession. (b)

The Oudich (Kaletiya) Brāhmaṇas of Broach answered Borradaile that either a foster-son or an adopted son might be taken. He would share *equally* with an after-born son, and he might, failing any other son of his real father, take both estates (like a *dvyāmushyāyana*). (c)

(a) Steele, L. C. p. 184.

(b) See above, pp. 179, 685. The passages cited by H. H. Wilson, Works, vol. V. p. 90, show that while some change of possession is necessary in general to complete a title, yet a partial possession may, when rightly taken, be extended to the whole, and may be dispensed with where the deed is incontrovertible. As to the distinction taken by the Śāstri between the ceremonies necessary for the transfer of immoveable and of moveable property, see the Mit. Chap. I. Sec. I. para. 31; Coleb. Dig. Bk. II. Chap. IV. T. 33 Comm.; Bk. V. T. 390 Comm.

(c) MS. Book A. p. 63. The place given to the foster-son in this Section is assigned to him only in deference to the uniform effect of the decisions of the Courts. See above, p. 927. Since that page was printed, the present writer has re-examined in the Borradaile MS. Collection the accounts given of their usages by 51 castes and sub-castes in Gujarāth. Of these 38 reject both the adopted and the foster-son; of this number are Brāhmaṇas of various classes. Two castes allow either kind of son. Ten allow only the foster-son. Two allow adoption only, but limited to a brother's son. In one caste (Vaghirs) the only recognized affiliation is by purchase. Four or five allow a *dharma-putra* to perform the parents' obsequies. Wherever the *pālak-putra* is allowed, his heritable right to his foster-father is recognized, and, with a couple of exceptions, a right in relation to his real father, like that of a *dvyāmushyāyana*. In one caste, (Surya Vamshi Kshatris of Broach) the foster-son takes only the self-acquired property of the foster-father, not the ancestral estate. In another (Guduja Māchi) “one may take a boy and give him a little.” One (Sura-

Adoption (so-called) amongst Naikins does not create any legal rights similar to those arising from a true adoption. (b).

thiya Māli) expressly excludes him from collateral succession in his new family. In most cases the foster-son is allowed to share equally with an after-born son; in others he is reduced to one-third or one-half as much. The relative shares are in a couple of instances subject to control by the father. A widow may take a foster-son from her husband's family, except (in some castes) when there is a nephew. The sanction of the family is required to her taking from her own family or a stranger, if there is property left by the husband (Surya Vajshi Kshatris). Liberty to remarry disqualifies a widow for taking a foster-son (Kahnumiya Hajjām). No rites are prescribed for taking as a foster-son beyond an expression of consent by the parties concerned.

It may be gathered that adoption is generally disallowed or unknown as a usage in Gujarāth, though, should any one take it on himself to adopt, the castes would find it hard to contend against the Śāstra; and it is supposed that in such a case the ceremonies would be governed by the scripture rules. Where a substitutionary son is allowed, it is, considering the relative members in the castes, in at least nine cases out of ten, a foster-son. The actual usage of the people thus seems to be quite opposed on this subject to the opinions of the Śāstris, and the decisions of the Courts influenced by those opinions. The difference is the more important, as from many of the answers of the castes it appears they were by the Government of the day promised the maintenance of their customary law when thus ascertained.

(b) *Mathura Naikin v. Esu Naikin*, I. L. R. 4 Bom. 545. The mere nurture and recognition by a temple woman of a man as her son was apparently thought sufficient by the Śāstri to make him her heir. (See Sec. IV *ad fin.* Above, p. 1068).

## SECTION VIII.

SUITS AND PROCEEDINGS CONNECTED WITH  
ADOPTION.

The principal decisions bearing on the substantive law of Adoption have been considered in the preceding Sections. (a) In the present Section it is proposed to supplement them with a certain number illustrating the questions that arise in litigation, and the way in which these have been dealt with by the Courts. The decisions will be distributed with reference mainly to the object of the litigation. Such a classification, though wanting in scientific precision, seems the most convenient for the practical purposes at which the present Section aims.

The exercise of jurisdiction by the Sovereign in this class of cases is fully recognized by the Hindû law. (b) The source of the rights and duties that come in question is in the religious law, but the relations themselves are of a kind on which the Civil Courts are bound to adjudicate. According to the customary law—"The caste is competent to decide on the question of a legal adoption. If unsettled by them, it may be referred to the Sirkar." (c)

1.—SUITS AND PROCEEDINGS ARISING OUT OF NON-  
ADOPTION.

"A man cannot cancel his agreement to adopt by entering into a different one." (d)

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(a) The cases of adoption in the Bombay Presidency "may be taken to be governed by the Mayûkha." (*The Collector of Madura v. Mootoo Ramalinga Sathupathy*, 12 M. I. A. 397, 439.)

(b) Compare what is said on matrimonial law by the Judicial Committee in *Ardaseer v. Perozeboye*, 6 M. I. A. at p. 391.

(c) Steele, L. C. pp. 185, 186. As to the jurisdiction of the caste and the appellate jurisdiction of the Courts of the King recognized, in all cases, see Ellis in 2 Str. H. L. 267—268; Yājñavalkya, Chap. II. 5, and the commentary of Vijñāneśvara, 1 Macn. H. L. pp. 133, 141 ss.

(d) MS. 1745.

No suit can be maintained for an order directing a minor widow to adopt, nor, it was said, was this a case in which a decree could be made declaring the validity of a direction (a) to adopt.

Where a will says—"I declare that I give my property to K., whom I have adopted. My wives shall perform the ceremonies and bring him up. ....Should he die, and my younger brother have more than one son, my wives shall adopt a son of his"—the gift to K. is absolute. So long as he is alive, no other can be adopted, nor can his right as devisee be defeated, whether the widows perform or decline to perform the ceremonies. (b)

Where a person made a will to the effect that two sons should be adopted in case his pregnant widow should bear a daughter, and no child was born, and one of the two to be adopted died, and the other was not adopted, the latter was held not entitled to take any property as adopted son or legatee under the will. (c)

A suit to declare void certain deeds of gift and acceptance of a child in adoption, brought by the donee against the donor,—the child not being a party to the suit,—was held not to be maintainable. The deeds, it was held, were not necessary to a valid adoption, and if the deeds were set aside, the adoption, if it had taken place, might be proved *aliunde*. If the deeds operated merely as an agreement to give and take in adoption, and a breach thereof had occurred, such breach, it was held, would not render the deeds void, or constitute any ground for setting them aside, or for declaring them void. (d)

(a) *Musst. Pearee Dayee v. Musst. Hurbunsee Kooer*, 19 C. W. R. 127. See above, pp. 997, 1011.

(b) *Nidhoomoni Debya v. Saroda Pershad Mookerjee*, L. R. 3 I. A. 253.

(c) *Abhai Charan v. Dasmani Dasi*, 6 Beng. L. R. 623.

(d) *Sree Narain Mitter v. Sreemutty Kishen Soondory Dassee*, L. R. Supp. I. A. 149.

## 2.—SUITS AS TO RIGHTS AND DUTIES OF WIDOW PRIOR TO ADOPTION.

A suit to obtain a declaration that a widow is heir of her deceased husband will lie, though she had authority to adopt. She does not forfeit her right by her omission or refusal to adopt. (a) It seems she cannot be forced to adopt. Where no adoption is made "under an authority for the purpose," the widows having equal rights in the estate may no doubt share it, making due provision for the maintenance of "the mother and sister of the deceased husband." (b)

"In the interval then between the death of her husband and the exercise of the power, the widow's estate is neither greater nor less than it would be if she enjoyed no such power or died without making an adoption. She has the same power, no greater and no less, to deal with the estate. Such acts of hers as are authorized and would be effective against reversioners will bind the son taken in adoption. Such acts as are unauthorized and in excess of her powers may be challenged by the son adopted or by any other successor to the estate." (c)

An adopted son is at liberty to question alienations made by the widow, the adoptive mother, before his adoption. But a presumption exists in favour of her transactions assented to by the persons next in succession when they took place. (d)

A Hindû widow claimed a share of ancestral property (under an *anumatti patra*, or deed of permission to adopt a son, alleged to have been executed by her husband) on behalf of the son whom she might adopt. It was held by the

(a) *Bamundoss Mookerjee v. Musst. Tarinee Dibbeah*, B. S. D. A. R. for 1850, p. 533; S. C. 7 M. I. A. 169; and *Prasannamayee Dasi v. Kadambini Dasi*, 3 B. L. R. O. C. J. 85.

(b) Coleb. in 2 Str. H. L. 91. See above, pp. 103, 248.

(c) *Lakshmana Rau v. Lakshmi Ammal*, I. L. R. 4 Mad. 160, 164.

(d) *Jadomoney Dabee v. Sarodaprosunno Mookerjee*, 1 Boul. 120; *Rajkrishna Roy v. Kishoree Mohun*, 3 C. W. R. 14, in which many earlier cases are referred to.



Sudder Dewanny Adawlut, that, until the adoption was made, no action would lie, and that the expression of any opinion as to the authenticity of the deed was in the present action uncalled for. (a)

The possession of a widow (who has authority to adopt) previous to the adoption is not that of a trustee for the son to be adopted, so as to prevent limitation (b) from operating. A widow in Bengal adopted a boy under a power from her deceased husband in the course of a suit by her against his unseparated brother. This was held competent to her, and also the continuance of the suit in her own name, as that had not been objected to, and she might take the estate as trustee for her son. (c)

A widow does not incur a penalty of absolute forfeiture by an attempt at a false adoption of a son. (d)

If a widow succeeds to her adopted son, and then adopts again, her intermediate alienation is not affected by such adoption. (e)

### 3.—SUITS TO ESTABLISH ADOPTION.

A party claiming in Bengal as a son adopted by a widow must establish by evidence—(1) authority given by the husband to adopt; (2) his actual adoption by the widow as her husband's son. (f)

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(a) *Musst. Subudra Chowdhryn v. Goluknath Chowdree et al.* 7 C. S. D. A. R. 143.

(b) *Gobin Chandra v. Anand Mohan*, 2 B. L. R. A. C. J. 313. See above, pp. 94, 95.

(c) *Dhurm Das Pandey v. Musst. Shama Soondri Debiah*, 6 C. W. R. 43, Pr. Co.

(d) *Komul Monee Dossee v. Alhadmonee Dassee*, 1 C. W. R. 256.

(e) *Gobindo Nath Roy v. Ram Kanay Chowdhry*, 24 C. W. R. 183 See above, p. 367.

(f) *Chowdhry Pudum Singh v. Koer Oodey Singh*, 12 C. W. R. P. C. 1; S. C. 2 B. L. R. P. C. 101.

A plaintiff who desires, as an adopted son, to recover property, must sue for it, not for a mere declaration of his status as adopted son. (a)

A vatandar in possession of vatan property may, as such, sue for a declaration of his adoption, preliminary to his application to the Collector for recognition of his right to officiate as a vatandar (under Bom. Act III. of 1874). (b)

An adopted son, who is afterwards discarded, may maintain a suit to establish his rights. According to the Hindû law the suit may be brought on his behalf by any kinsman or friend. (c) This would now be subject to the provisions of the Code of Civil Procedure (Act XIV. of 1882, Secs. 440 ss) and to the ruling of the Judicial Committee in *Doorga Persad's* case. (d)

On an estate descending to an adopted son, and from him to his widow, a further power to adopt given by the adoptive father to his widow becomes incapable of execution. (e) An adoption under it is void. It does not give to the adopted a right ripening into that of a duly adopted son when the elder widow succeeds to the property. (f)

Where a widow adopts under authority of her husband, the authority must be strictly proved. (g) If the husband's

(a) *Ramchandra Narayan v. Krishnaji Moreswar*, Bom. H. C. P. J. 1881, p. 288.

(b) *Ramchandra v. Radhabai*, Bom. H. C. P. J. 1880, p. 160.

(c) 2 Str. H. L. 79.

(d) Above, p. 766.

(e) *Pudma Coomari Debi v. The Court of Wards*, L. R. 8 I. A. 229. See above, Sec. VII. I. 2 B., and pp. 974, 982.

(f) See above, Sec. VII. I. 2 B. "Relation shall never make an act good which was void for defect of power." Vin. Abtr. Tit. Relation (H) 4; *Butler and Baker's* case, 3 Rep. 29 A. See too *Hawkins v. Kemp*, 3 Ea. 410.

(g) *Chowdhry Pudum Singh v. Koer Oodsy Singh*, 12 C. W. R. P. C. 1; 2 B. L. R. 101 P. C.; 12 M. I. A. 350.

authority to adopt is verbal, it must be proved by witnesses; the widow's testimony alone being insufficient. (a)

If the husband's authority is in writing, and his handwriting is proved, the signature of witnesses is unnecessary. Otherwise it must be proved by witnesses. (b)

In a case of inconsistent evidence as to the fact of adoption, the non-designation of the adopted in a public document as son of the adoptive father decided the Court against the alleged adoption. (c)

In *Gangava v. Rangangavda*, (d) the following facts were held inconsistent with an alleged adoption :—

(1) The adoptive mother's name continued in Government records for lands belonging to her husband, after the alleged adoption. (2) The adopted acted as deputy under the adoptive mother. (3) The adoptee assumed his natural father's name after the date of his alleged adoption. (e)

A presumption arises against the genuineness of a deed of permission to adopt from its not being acted on for 17 years after the husband's death. (f)

The omission of the usual intimations and ceremonies is a ground for strong suspicion as to the genuineness of an alleged adoption. (g)

The registration of deeds giving power to the widow to adopt was recommended. When such a deed is not registered,

(a) *Musst. Tara Mune Dibia v. Dev Narayun Rai et al*, 3 C. S. D. A. R. 387 ; *Ry Sevagamy Nachiar v. Heraniah Gurbah*, 1 Mad. Dec. 101 ; 2 Macn. H. L. 183.

(b) *Ry. Sevagamy Nachiar v. Heraniah Gurbah*, 1 Mad. S. D. A. Dec. 101.

(c) *Musst. Sabitree Dae v. Sutar Ghun Sutputtee*, 2 C. S. D. A. R. 21.

(d) Bom. H. C. P. J. 1881, p. 248.

(e) See above, p. 1209.

(f) *Chundermonee Debia Chowdhoorayn v. Munmoheenee Debia*, 8 M. I. A. 477.

(g) *Sootrugun Sutputty v. Sabitra Dae*, 2 Knapp, 287.

the weight of evidence for or against an alleged adoption has to be compared. (a) In the particular case it removed suspicion.

In the absence of strong documentary evidence for an alleged adoption, the Privy Council preferred the judgment of the lower Appellate Court to that of the High Court, as it had a better opportunity of testing the probabilities of the case. (b)

Evidence is not necessary of the execution of a permission to adopt according to the exactness required in the case of a will. (c)

When the Court is satisfied of the power comparatively slight evidence of the ceremonies will suffice. (d)

The identity of a deed of permission to adopt was held sufficiently established by a reference to it in a subsequent proved deed. (e)

The probabilities are in favour of an alleged adoption, where the document authorizing the widow to adopt bears the genuine signature of the deceased husband, and the next heir who disputes the document is shown to be on bad terms with the deceased. (f)

In some cases upon a disputed question of adoption, though the Courts in India held the evidence not sufficient to prove

(a) *Chundernath Roy v. Kooar Gobindnath*; *The Collector of Moorshedabad v. Ry Shibessuree Dabee*, 11 B. L. R. 86.

(b) *Nilmadhv Das v. Biswambhar Das*, 12 C. W. R. P. C. 29; S. C. 3 B. L. R. P. C. 27; S. C. 12 M. I. A. 85.

(c) See above, pp. 961, 964.

(d) *Mohendrolal v. Rookiney Dabey*, Coryt. R. 42.

(e) *Kishen Shunker Dutt v. Moha Mya Dossee*, C. W. R. Sp. No. 210.

(f) *Sri Virada Pratapa Raghunada v. Sri Brozo Kishoro Patta Deo* 25 C. W. R. P. C. 291; S. C. I. L. R. 1 Mad. 69; S. C. 7 M. H. C. R. 301.

the adoption, the Privy Council has reversed the decision and decreed in favour of the adoption. (a) Thus the Privy Council decided in favour of adoption, upon a conflict of evidence as to whether it took place during pollution or not. (b)

A bequest to two persons as adopted sons was held to fail through the simultaneous double adoption being void. (c)

Where the plaintiff claims the full rights arising under an ordinary adoption, a different form of adoption (*i. e.*, *dvyâmushyâyana*) cannot be set up. (d)

Persons claiming as adopted sons of a widow must prove their own adoption, and that the widow had possession in her own right; (e) so too where plaintiff sues as adopted son of the owner himself; (f) but the plaintiff need not in the former case prove how the widow came into possession. (g) A suit to establish adoption independently of any claim to property can be maintained upon an institution fee of rupees ten, provided the plaintiff shows distinctly that he has a cause of action and a right to consequential relief. (h)

(a) *Huradhun Mookurjia v. Muthooranath Mookurjia*, 4 M. I. A. 414; S. C. 7 C. W. R. P. C. 71; *Rungama v. Atchama et al*, 4 M. I. A. 1; S. C. 7 C. W. R. P. C. 57.

(b) *Ramalinga Pillay v. Sadasiva Pillay*, 9 M. I. A. 506; S. C. 1 C. W. R. 25 P. C.

(c) *Siddesory Dossee v. Durgachurn Sett*, Bourke, 360. Above, p. 981.

(d) *Musst. Edul Koonwar v. Koonwar Dabee Singh*, 5 Dec. N. W. P. 341.

(e) *Chutturdharee Lall v. Musst. Parbutty Kowar*, 12 C. W. R. 120.

(f) *Bhairabnath Sye v. Maheschandra*, 4 B. L. R. A. C. J. 162; *Ishur Panday v. Musst. Buskeela Koonwar*, B. S. D. A. R. for 1858, p. 471.

(g) *Chutturdharee Lall v. Musst. Parbutty Kowar*, 12 C. W. R. 120.

(h) *Baji Balvant v. Raghunath Vithal*, Bom. H. C. P. J. for 1876, p. 142.

A certificate cannot be refused to administer an adopted minor's estate, though his adoption has never been recognized, for such a certificate is necessary to clothe any administrator with authority to sue for such recognition of the adoption of the minor. (a)

A certificate of guardianship under Act XL. of 1858 will not entitle a minor or his guardian, until the adoption is proved, to interfere with the possession of the estate by the widow of the deceased who denies the adoption. (b)

#### 4.—SUITS TO SET ASIDE ADOPTION.

The Legislature has by Acts VII. of 1870 and IX. of 1871 and XV. of 1877 recognized the right to bring a suit to set aside an adoption independently of any claim to property. (c)

The *onus probandi* lies on the adopted son, though defendant, to prove the validity of the adoption, and not on the plaintiff suing as heir to prove its invalidity, even though he alleges fraud, and adduces no evidence in support of it. (d)

The presence of a brother of the adoptive father at an adoption and his associating the adopted son as such with him in a suit prevents his sons from afterwards denying the adoption. (e)

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(a) *Chintaman v. Sitaram*, Bom. H. C. P. J. 1879, p. 566.

(b) *Panch Cowree Mundul v. Bhugobutty Dossia*, 6 C. W. R. Misc. 47.

(c) *Kalova v. Padapa*, I. L. R. 1 Bom. 248, per Westropp, C. J. In the same case the points for consideration on a question of adverse possession by a widow, and on one of the validity of an adoption, are set forth with a reference on the latter point to earlier cases.

(d) *Tarini Charan v. Saroda Sundari Dasi*, 3 B. L. R. A. C. J. 145; S. C. 11 C. W. R. 468; *Roopmonjooree v. Ramlall Sircar*, 1 C. W. R. 145; *Kripa Moyee Debia v. Goluck Chunder Roy*, 4 C. W. R. 78; *Bissessur Chuckerbutty v. Ram Joy Mojoomdar*, 2 C. W. R. 326. See above, Sec. VI. A. 5.

(e) *Nidhoomoni Debya v. Saroda Pershad Mookerjee*, L. R. 3 I. A. at pp. 253, 256; *Chintu v. Dhondur*, 11 Bom. H. C. R. 192. The principle of estoppel was followed in the similar case, *Sadashiv v. Hari*, *ib.* 190. See above, Sec. VI. A. 5.

The following grounds have been held insufficient for setting aside an adoption, once effected :—

(1) Its not having taken place at the usual residence of parties (*a*) ; (2) Its having taken place long after the death of adoptive father (*b*) ; (3) Want of permission from Government (*c*) ; (4) Tonsure having been performed in the family of birth after gift and acceptance but before fire sacrifice (*d*) ; (5) Existence of a nearer relation than adoptee available for adoption (*e*) ; (6) Want of presence of the mother (natural or adoptive), of burnt offerings, or of drinking saffron water by other than adoptive father, amongst Śūdras. (*f*)

*A* has two sons *B* and *C*. *B* marries *D* and dies before *A*. *C* dies unmarried after *A*. *E*, as widow of *A*., relinquishes her rights in favor of *D* and her adopted son *F*. This being sufficiently proved, *E* cannot question *F*'s adoption. (*g*)

A stranger having no interest in the matter has no right, even with the consent of the presumptive reversionary heirs, to sue for a declaration that an adoption made by a widow is invalid. (*h*)

Although a suit, to contest an adoption, made by a Hindū widow of a son to her deceased husband, may be brought by a contingent reversionary heir, yet it is not the law that any one who may have a possibility of succeeding to the

(*a*) *Bhasker Buchajee v. Narro Ragoonath*, Bom. Sel. R. 24.

(*b*) *Ib.*

(*c*) *Ib.*

(*d*) *Musst. Dullabh De v. Manu Bibi*, 5 C. S. D. A. R. 50.

(*e*) *Gocoolanund Dass v. Wooma Dasee*, 15 B. L. R. 405 ; S. C. 23 C. W. R. 340 ; *Sree Brijbhokunjee Maharaj v. Sree Gokoolootsaojee Maharaj*, 1 Borr. 181, 202 (2nd Edn.).

(*f*) *Alvar Ammal v. Ramasawmy Naiken*, 2 M. S. D. A. R. for 1867 ; *Sootrugun Sutputty v. Sabitra Dye*, 2 Knapp 287 ; S. C. 5 C. W. R. P. C. 109.

(*g*) *Musst. Ladoo v. Musst. Oodey Kowree*, N. W. P. S. D. B. Pt. II. 1864, p. 365.

(*h*) *Brojo Kishoree Dassee v. Sreenath Bose*, 9 C. W. R. 463 ; S. C. 8 C. W. R. 241.

estate of inheritance held by the widow for her life is competent to bring such a suit. The right to sue must be limited. As a general rule, the suit must be brought by the presumptive reversionary heir, that is to say, by the person who would succeed to the estate if the widow were to die at the time of the suit. But it may be brought by a more distant heir, if those nearer in the line of succession are in collusion with the widow, or have precluded themselves from interfering.

If the nearest heir had refused, without sufficient cause, to institute proceedings, or if he had precluded himself by his own act or conduct from suing, or had colluded with the widow, or had concurred in the act alleged to be wrongful, the next presumable heir would be, in respect of his interest, competent to sue. In such a case, upon a plaint stating the circumstances under which the more distant heir claimed to sue, a Court would exercise a judicial discretion in determining whether he was or was not competent, in that respect, to sue, and whether it was requisite or not, that any nearer heir should be made a party to the suit.

In a suit to have an alleged adoption set aside, the plaintiff, a minor, through his guardian, claimed to sue, on the strength of being the adopted son of (the husband of) a daughter of a brother of the father of the deceased, under whose authority the adoption was alleged to have been made by the widow, the defendant. The Judicial Committee without deciding that as an adopted son this minor had the same rights as a natural-born son, and without deciding that he would have been entitled, in default of nearer relations, to succeed to the estate of inheritance, after the death of the widow, pointed out, that he could only have succeeded as a distant bandhu, (a) and that he had not a vested, but at most a contingent, interest. Their Lordships held, that there being, in fact, heirs nearer in the line of succession than this minor,

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(a) See above, pp. 489, 498.



the grounds of his competence to sue in respect of his interest, assuming that interest to exist, should have been made out in the manner above indicated. (a) The conclusions in the suit referred to were, that a suit to set aside an adoption by a widow may be brought—(1) by a presumptive reversionary heir; (2) by an heir a little more distant, in case the former act in collusion with the widow; possibly (3) by an adopted son of a deceased brother's daughter's son, as a bandhu. (b)

An obscure association of a boy as adopted son of a deceased person, in a suit brought by his widows to recover the husband's share in joint property, was held not conclusive of the boy's adoption. A reversioner was allowed to prove its not having taken place. (c)

In a suit on a ground of existing right of inheritance and for possession and mesne profits in which the claims to relief are abandoned, the Court will not allow a change of claim and declare an adoption invalid. (d)

A power to adopt imposed the condition of the consent of the husband's mother. A suit was brought against the adopted son, but the objection of non-fulfilment of the condition precedent of consent was not raised until the case was taken in appeal to the Privy Council. It was held then too late. (e)

*Ignorantia legis non excusat*, it was said, is a maxim applicable to the Hindû law of adoption. (f) There may

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(a) *Rani Anand Kunwar et al v. The Court of Wards*, I. L. R. 6 Calo. P. C. 764. See above, p. 498.

(b) *Ib.*

(c) *B. Sheo Manog Singh v. B. Ram Prakash Singh*, 5 C.S.D.A.R. 145.

(d) *Ry Rajessuree Koonwar v. Maharanee Indurjeet Koonwar*, 6 C. W. R. 1.

(e) *Rajendronath Holdar v. Jagendronath Banerjee*, 14 M. I. A. 67; so also *Musst. Mulleh v. Purmanund*, 4 Dec. N. W. P. 201.

(f) *Radhakissen v. Sreekissen*, 1 C. W. R. 62. Ignorance of the law does not relieve from a liability, but it operates no further. See per Blackburn, J., in *Reg. v. Mayor of Tewkesbury*, L. R. 3 Q. B. pp. 629, 635. See also per Lord Westbury in *Cooper v. Phibbs*, L. R.

however be an excusable ignorance as when the Judicial Committee said :—" The concurrence of the widow, and the various acts of acquiescence attributed to her, would be important if they were brought to bear upon a question which depended upon the preponderance of evidence ; but if the facts are once ascertained, presumptions arising from conduct cannot establish a right which the facts themselves disprove. The appellant is a Hindû female. So long as she is acting without the guidance of a disinterested adviser her acquiescence in an alleged adoption or will ought not to prejudice her. In such a case as the present it was hardly to be expected that she would be capable of distinguishing between an adoption in fact, and a legal adoption, or between a will in fact, and a valid will. The acts attributed to her are really no confirmation of the respondent's case, as every one of them upon which reliance is placed might equally have been done with respect to a legal or an avoidable adoption." (a)

An acquiescence arising from ignorance is not binding, though the ignorance is of the law applicable to the particular case. (b) So too consent given by the first adopted son to an arrangement of his father under which the second adopted son was allotted certain property would not, it was ruled, be binding on the first adopted son, if he gave the consent in ignorance of his right, or if the father departed from the arrangement to the complete disinherison of the first son himself. (c)

An assent obtained by a widow on a representation of an authority from her husband will not avail as against the

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2 E. and I. A. at p. 170. Jagannâtha in Coleb. Dig. Bk. II. Chap. IV. T. 54, and the judgment of the Judicial Committee in *Periasami v. Periasami*, L. R. 5 I. A. 61, 76.

(a) *Tayammaul v. Sashachalla Naiker*, 10 M. I. A. 429.

(b) See *Rangamma v. Atchamma*, 4 M. I. A. 1. ; *Beauchamp v. Winn*, L. R. 6 E. and I. A. 223 ; *Thomson v. Eastwood*, L. R. 2 A. C. 215, and per Sir G. Jessel, M. R. in *Lacey v. Hill*, L. R. 4 Ch. D. at. p. 546.

(c) *Sudanund Mohapattur v. Bonomallee*, Marshall, 317.

sapinda heirs. The assent, too, being moved by self-interest, was held insufficient. (a)

#### 5.—SUITS IN WHICH ADOPTION IS AN INCIDENTAL QUESTION.

An adoption *de facto* must be supposed to be valid until set aside. (b) An objection that an adoptee was the eldest son of his natural father was rejected in special appeal, because though raised it was not pressed in the lower Courts, nor taken specially in the petition of special appeal. (c)

A case in which a conveyance was absolute, unless the grantor should adopt a son, but in that case to be subject to redemption, was held a sale subject to conversion into a mortgage during the vendor's life, but to become irredeemable on his death. (d)

A widow may resist an ejectment brought by a person whom she has recognized as adopted son on the ground of the invalidity of the adoption, though her acknowledgment has been acted on by the authorities. (e)

A plaintiff sued as widow of an adopted son for property of the adoptive father, and also on the ground of devise to the son. The adoption was held invalid according to Hindû law, yet the High Court held that as the language of the testator sufficiently indicated the person who was to be the object of his bounty, that person was entitled to the property, although the testator conceived him to possess a character, which, in point of law, could not be sustained. (f) In a similar case it was held by the Judicial Committee that

(a) *Karunabdhî v. Gopala*, I. L. R. 7 I. A. 173, 177. Savigny denies the generally nullifying effect of error. See his System, Vol. 3, App. VIII. and in the same sense Coleb. Bk. II. Ch. IV. T. 54 Comm.

(b) *Nunkoo Singh v. Purm Dhun Singh*, 12 C. W. R. 356.

(c) *Joy Tara Dossee v. Roy Chunder Ghose*, 1 C. W. R. 136. See above, Sub-Sec. 4.

(d) *Subhâbhat v. Vâsudevhat*, I. L. R. 2 Bom. 113.

(e) *Thakoor Oomrao Singh v. Thakooranee Mahtab Koonour*, 2 Agra Rep. 103. See above, Sub.-Sec. 4, p. 1227.

(f) *Jivanee Bhayee v. Jiru Bhayee*, 2 M. H. C. R. 462.

according to the true construction of the testator's will there was a gift of property to a designated person, independently of the performance of ceremonies. (a)

#### 6.—SUITS AND PROCEEDINGS CONSEQUENT ON ADOPTION.

In granting a certificate under Act XXVII. of 1860 to an adopted son, a nephew of the deceased, the Judge ought to look into the fitness as well as the propinquity of the adoptee. (b)

After adoption, the father had a son born to him. In a partition he gave the adopted boy a larger share than he was by law entitled to receive. The father then married a second wife, and had by her several children. These, it was held, could not contest the above disposition in favour of the adoptee. (c)

Documents of the like tenor were executed by a man and his adopted son by which the property of the former was made over to his wife for life, without power of alienation, and a succession was secured to the adopted son. This was construed as a family settlement, giving to the son an estate in remainder, not as giving to the wife as a widow such an estate as if there had been no son. (d)

The title of a second (invalidly) adopted son could not be maintained, it was held, on the ground of acquiescence by the first, as this had proceeded on an assertion by the father of the second son's right. Whether the first son's ratification would have the effect in such a case of previous consent was thought doubtful; but at any rate there had not been the knowledge which would make it binding. (e)

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(a) *Nidhoomoni Debya v. Saroda Pershad*, L. R. 3 I. A. 253.

(b) *Nunkoo Singh v. Purn Dhun Singh*, 12 C. W. R. 356.

(c) *Yekeyamian v. Agniswarian et al*, 4 M. H. C. R. 307. See above, pp. 77, 702, 776.

(d) *Musst. Bhagbuttee Dae v. Chowdry Bholanath Thakoor*, L. R. 2 I. A. 256.

(e) *Rangamma v. Atchamma*, 4 M. I. A. 1, 103. On the doctrine of Acquiescence see *Beauchamp v. Winn*, L. R. 6 E. & I. App. 233. On

The first adopted son, however, was allowed to retain all he could claim against the father's disposition only on condition of giving up to the second all over which the father had unfettered power.

An adoptee, like a natural born son, cannot claim to have a specific share declared and defined, but is only entitled to a decree declaring that the property is ancestral. (a) A suit by the son of a first adopted son having been brought as heir of the second adopted son, the plaintiff cannot in appeal change his ground of action, treat the second adopted son as trespasser, and seek to recover property as belonging to his ancestor. (b)

A son adopted *pendente lite*, to be bound by a pending suit affecting his adoptive father's ancestral property, must be made a party to the suit. (c)

A representation made by one party for the purpose of influencing the conduct of the other party (as to marriage, giving in adoption, &c.), and acted on by him will in general be sufficient to entitle him to the assistance of the Court for the purpose of realizing such representation. (d)

After the death of an adopted son, a widow alienated part of the property and subsequently adopted again. It was held that the second adopted son took subject to the alienation. (e)

Election *see per James, L. J., in Codrington v. Lindsay*, L. R. 8 Ch. A. pp. 578, 592.

(a) *Heera Singh v. Burzar Singh*, 1 Agra H. C. R. 256. He cannot claim definition without partition, as the shares may vary through births and deaths, &c.

(b) *Gopee Lall v. Musst. Chandrasee Buhoojee*, 11 B. L. R. P. C. 391; S. C. 19 C. W. R. P. C. 12. The adoption here of the second son was invalid according to Hindû law, as the first had left a son. *See above*, p. 944.

(c) *Rambhat v. Lakshman Chintâman Mayâla*, I. L. R. 5 Bom. A. C. J. p. 630.

(d) *Bhala Nahana v. Parbhu Hari*, I. L. R. 2 Bom. 67.

(e) *Gobindo Nath Roy v. Ram Kanay Chowdhry*, 24 C. W. R. 183. Reference is made to *Bhoobun Moyee's case*, 10 M. I. A. 165; *see Sreemutty Deeno Moyee Dossee v. Doorga Pershal Mitter*, 3 C. W. R. 6 Misc. R. *Above*, p. 367.

A widow redeems a mortgage of her husband and sells the property at a profit. She then adopts a boy; and in the deed of adoption agrees to let the boy have the property "when released." The purchaser is said to have attested the deed of adoption. It was held that the attestation does not bind the purchaser either as to an agreement of resale or as to the price for which the property was to be sold. (a)

When a widow applies under Act XL. of 1858 for a certificate in respect of an estate alleged to belong to an adopted son, the questions for inquiry are : (1) minority of the boy ; (2) fitness of the petitioner for management. (b) A certificate under Act XL. of 1858 is rightly given to the guardian, where there is no doubt of the fact of adoption, the objector, who does not claim to be the guardian, having no *locus standi*. (c) A certificate of guardianship was refused when the validity of the adoption was disputed. (d)

An adoptive mother, as next heir, was held entitled to the management of a lunatic's estate in preference to a uterine brother. (e)

A lady who has adopted a son may, as his guardian, be served with an order of foreclosure under the Bengal law. (f)

"In a Nuggur Panchaet case . . . in which both parties and Panch were Brâhmans and Kulkarnis, the widow of an adoptee obtained a decree for the possession of a vatan given to him by the adopter (by the deed of adoption), in opposition to a claim set up by the nephew of the latter according to blood." (g)

(a) *Rambhat v. Ramchandra*, Bom. H. C. P. J. 1879, p. 426.

(b) *Brohmo Moyee v. Chettur Monee*, 8 C. W. R. 25.

(c) *Kisto Kishore Roy v. Issur Chunder Roy*, 15 C. W. R. 166.

(d) Above, pp. 1021—22.

(e) *Huree Kishore Bhya v. Nullita Soonduree Goopta*, 18 C. W. R. 340.

(f) *Ras Muni Dibiah v. Pran Kishen Das*, 4 M. I. A. 392. See now above, p. 674.

(g) Steele, L. C. p. 188.

A widow has not really such an interest in the appeal or such a *locus standi* as entitles her to insist that an appeal should go on, though the minor party, her adopted son, in whose name the suit was brought, after coming of age, wishes to withdraw from it. (a)

A widow, claiming under the will of her husband, is the proper person to obtain a certificate under Act XXVII. of 1860, notwithstanding the objection of a person alleged to be the adopted son of deceased. (b)

A, alleging himself to be an adopted son, opposed the application for the grant of certificate under Act XXVII. of 1860 to B, who, irrespective of the alleged adoption, would be the legal lineal heir of the deceased; the Court before which the application was made refused to grant the certificate on the ground that sufficient *prima facie* evidence existed establishing the validity of the adoption. On appeal it was held that the Appellate Court, concurring with the opinion expressed by the Court of first instance in respect of the *factum* of the adoption, would not be justified in setting aside the decision on the ground that such Court was wrong in entering into and deciding the question as to the validity of the adoption. It was laid down that on an application for the grant of certificate under Act XXVII. of 1860, opposed by a party alleging a preferential title to it, the Courts should adjudicate the question of title with a view to determine which party has the preferential right to the certificate. (c)

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(a) *Ry Bistoopria Putmadaye v. Nund Dhull*, 13 M. I. A. 602.

(b) *Bissumbhur Shaha v. Sy Phool Mala*, 21 C. W. R. 31; i. e. until he establishes his adoption.

(c) *Sheetanath Mookerjee v. Promothonath Mookerjee*, I. L. R. 6 Calc. 303.

Reference was made to *Kali Coomar Chatterjee v. Tara Prosum Mookerjee*, 5 Calc. L. R. 517; *Musst. Anundee Koor v. Bachoo Sing*, 20 C. W. R. 476; *In re Oodoyckurn Mitter*, I. L. R. 4 Calc. 411; *Koonj Behary Chowdhry v. Gocool Chunder Chowdhry*, I. L. R. 3 Calc. 616.

A permission to adopt during the life of the son cannot have effect given to it. (a)

A widow, by virtue of the authority given by her husband's will, adopted a son and afterwards discarded him for misbehaviour. The boy, on attaining maturity, applied for the withdrawal of the certificate and for the grant of one to him. The validity of the will, it was said, could only form the subject-matter of a regular suit. It could not be contested in a summary proceeding. (b)

Where a will gave the testator's widow permission to adopt and made provision for the adopted son entering into possession only after her death, providing further that if the adopted son died unmarried the estate should pass to the testator's nearest *sapinda gnyati*, it was held that the gift or bequest was, according to the doctrine laid down in the case of *Tagore v. Tagore*, void and of none effect, because the nearest *sapinda* was a person who might not be in existence at the death of the testator, and one who could not be ascertained at that time. (c)

"The case of *Baijnath Sahai v. Desputty Singh* (d) was this. A Hindû testator died, leaving B, alleged to be his adopted son, and C, who would be his heir in default of adoption, and made a will of which B applied for probate, and it was held under the *Succession Act* and *Hindû Wills Act* that creditors of C were not parties having any interest in the estate of the deceased, and were therefore not entitled to oppose the grant of probate. Their Lordships think this was a right decision." (e)

(a) See above, p. 968.

(b) *Issur Chunder v. Pooruna Beebee*, 4 C. W. R. Misc. 16. It would be hard to find any authority for a widow's "discarding" a son really adopted. She is dependent on him, not he on her. See above, pp. 1153, 1173.

(c) *Ramgutte Acharjee v. Kristo Soonduree Debia*, 20 C. W. R. 472. See above, p. 217.

(d) L. R. 2. Calc. 208.

(e) *Rajah Nilmoni Singh Deo Bahadoor v. Umanath Mookerjee*, L. R. 10 I. A. pp. 89, 86.



## 7.—JUDGMENTS AND EVIDENCE IN PREVIOUS CASES.

A decision by a competent Court upon a question of adoption is not a judgment *in rem* or binding upon strangers, nor is a decree in such a case admissible as evidence against strangers, (a) nor is it binding on any reversionary heir not a party to the suit, nor upon an adoptee in a suit by a reversionary not a party to the former suit. (b)

The plaintiff's adoption, it was said, having been in issue in a former suit, though the defendant was not a party to it, and decided in the plaintiff's favour, was to be held good against the defendant until he got proof against the adoption (c) or could prove fraud or collusion. (d) But in *Padma Coomari Debea's* case (e) it was held that a former judgment against the validity of an adoption was not *res judicata* when the parties had been changed, but that the decision of the point of law on which the judgment had turned was binding as a precedent. A suit to set aside the adoption of the defendant, in which the adoptive mother was made a party, was held barred by Section 2 Act VIII. of 1859, because the same issue as to the validity of the adoption had been tried substantially in a former suit between the same parties as to a portion of the property now at issue. (f) A plaintiff suing for property belonging to a Hindû widow on the ground of his being an adopted son of

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(a) *Kanhya Lall v. Radha Churn*, 7 C. W. R. 338.

(b) *Jumona Dassya v. Bamasoondari Dassya*, 25 C. W. R. 235; S. C. I. L. R. 3 I. App. 72. There is not in fact a recognized process by which an adoption can be established or set aside as to all persons.

(c) *Seetaram v. Juggobundoo Bose*, 2 C. W. R. 168.

(d) *Rijkristo Roy v. Kishoree Mohun Mojoomdar*, 3 C. W. R. 14.

(e) L. R. 8 I. A. 229.

(f) *Kristo Beharee Roy v. Bunwaree Loll Roy*, 19 C. W. B. 62. See now Act XIV. of 1882, Sec. 13.

her husband's brother is not barred by a decision, in respect of other property, that he was not such. (a)

In a suit between the adopted son of a landlord and the adopted son of his tenant, the decree being in favor of plaintiff by a competent Court, an appeal to the Privy Council or an omission to take rent for many years or to eject defendant, did not, it was held, alter the relationship of landlord and tenant between the parties. (b)

The denial by *A* in an inquiry under Bombay Regulation VIII. of 1827 that *B* was adopted son of *C*, does not absolutely estop *A* from asserting in a subsequent suit that *C* adopted *B*. (c)

A deposition of a plaintiff, in a suit against defendant, a widow (managing for her minor first adopted son) is not admissible in evidence under Sec. 33 of the Evidence Act in a subsequent suit by the defendant widow as mother and guardian of a second adopted son, as that son is not a representative in interest of the widow who was party to the former suit, but sues in his own right. (d)

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(a) *Kripa Ram v. Bhugwan Doss*, 10 C. W. R. 100. The parties having been the same would be bound by a prior adjudication on the same question of right or jural relation between them, though the physical objects of their contention were different, *see* Act XIV. of 1882, Sec. 13; *Krishna Behari Roy v. Musst. Brojeshwari Chowdhani*, L. R. 2 I. A. 285. A question of limitation decided in a suit as to one piece of property was disallowed in a suit as to another in *Maharaja Rajender Kishen Sing v. Raja Saheb Pershad Sein*. Pr. Co. 21, May, 1874.

(b) *Huronath Roy v. Golucknath Chowdhry*, 19 C. W. R. 18. Limitation is computed from the determination of the tenancy, and the time is 12 years. Act XV. of 1877, Sch. II. Art. 139.

(c) *Pandurang Ballal v. Dhondo Ballal*, Bom. H. C. P. J. 1876, p. 209.

(d) *Mrinmoyee Dabea v. Bhoobunmoyee Dabea*, 15 B. L. R. 1; S. C. 23 C. W. R. 42. The decision may be questioned on the ground that there must be a continuity of the estate and of representation of it. The other party must of course be the same in both suits to make his deposition admissible.

A certificate may be granted to a widow, as guardian of her minor son, to collect her husband's debts, notwithstanding that her husband's adoption has been set aside. (a)

### 8.—LIMITATION.

The limitation prescribed for a suit for a declaration of the validity of an adoption is six years from an interference with the rights of the adopted son as such. (b) In a suit for a declaration that an adoption was not made or was not valid, the same period of limitation runs from "when the alleged adoption becomes known to the plaintiff." (c)

Where a widow, after the death of her son, adopts a boy under an alleged will of her husband, and a sister of the natural son sues for the inheritance on behalf of her son, disputing the will and the adoption, the cause of action arises on the death of the widow, not on the date of the adoption. An acknowledgment of the sister, previous to the birth of her son, admitting the adoption, does not bar the son's right (d); and he may sue within three years from attaining his majority. A reversioner's right to sue for possession by setting aside an adoption by a widow accrues on the death of the widow and not on the date of an adop-

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(a) *Nitto Kallee Debee v. Obhoy Gobind*, 5 C. W. R. Misc. R. 10.

(b) Act XV. of 1877, Sch. II. Art. 119. The intention must, it seems, be to bar a suit on the ground of adoption in respect of the rights interfered with. An adoption cannot be cancelled by a mere seizure of an insignificant piece of property on a denial of adoption which remains unchallenged only because it is not worth while to challenge it.

(c) *Ib.* Art. 118. See above, p. 1002, Note (a).

(d) *Tarini Charan v. Saroda Sundari Dasi*, 3 B. L. R. A. C. J. 145; S. C. 11 C. W. R. 468. See note (c). In Bombay the daughter would have to sue in her own right, which precedes that of her son. See above, pp. 104, 107.

tion. (a) Possession by strangers as adopted sons of a widow is not adverse against the reversioners so long as she is alive. (b) As against an adopted son, suing for his share in the ancestral estate, limitation begins on demand and refusal. (c) The time now runs from when a person excluded is aware of the exclusion. (d)

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(a) *Srinath Gangopadhya v. Mahes Chandra Roy*, 4 B. L. R. 3 F. B. *Musst. Raj Koonwar v. Musst. Inderjeet Koonwar*, 13 C.W.R 52; *Tarini Charan v. Saroda Sundari Dasi*, 3 B. L. R. A. C. J. 145; S. C. 11 C. W. R. 468. Comp. note (c) p. 1236.

(b) *Srinath Gangopadhya v. Mahes Chandra*, 4 B. L. R. 3 F. B.

(c) *Ayyavu Muppanar v. Niladatchi Ammal*, 1 M. H. C. R. 45; 3 M. H. C. R. 99.

(d) *Hari v. Maruti*, I. L. R. 6 Bom. 741; Act XV. of 1877, Sch. II. Art. 127.



## APPENDIX.

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*Translations of Yājñavalkya, II. 47, 50, and 175, with the Commentary on these verses of the Mitāksharā.* BY DR. A. FÜHRER.

*Yājñavalkya, II. 47. (a)*

“A son need not pay, in this world, money due by his father for spirituous liquors, for lustful pleasures, for losses at play; nor what remains unpaid of a fine or toll; nor anything idly promised.”

*Vijñāneśvara's Commentary.*

A debt incurred by a drinker of spirituous liquors, or under the influence of lust for the sake of enjoying a woman, or caused by losses at play, what remains due of a fine or toll, (b) and money idly promised, that is, promised to impostors, bards, wrestlers, or the rest; for it is declared in a *Smṛiti*: “Fruitless is a present given to an impostor, a bard, a wrestler, a quack, a knave, a fortune-teller, a spy, or a robber”;—all such debts incurred by the father, his son or other heir need not pay to the vintner and the rest. In the above clause, it is mentioned that the remaining portion of a fine or toll should not be paid; by that is not to understand that he has to pay the whole sum, if it is to be paid. For *Uśanas* says in his *Smṛiti*: “The son need not pay the fine or the balance of a fine, a toll or the balance of a toll, or [any debt of the father] which is not proper.” (c) Also *Gautama* [XII, 41] says: “Money due by a surety, a commercial debt, a toll, debts contracted for spirituous liquors, a loss at play, and a fine shall not involve the sons, that is, they shall not be paid by the sons [of the debtors].” In this way it has been mentioned which kinds of debts should not be paid.

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(a) See above, p. 625.

(b) Haradatta in his Commentary on *Gautama*, XII. 41, explains *śulka* “fee due to the parents of the bride.” The same does *Jagannātha*, see *Colebrooke*, Digest I. 202.

(c) According to *Vīramitrodaya*, I. 106, p. 1, debts for wines and spirits are improper debts.

*Yājñavalkya, II. 50. (a)*

"The father being gone to a foreign country, or deceased [naturally or civilly], or afflicted with an incurable disease, the sons or their sons must pay his debt, but, if disputed, it must be proved by witnesses."

*Vijñāneśvara's Commentary.*

If the father is dead [naturally deceased, or having become a religious anchorite], or has gone to a distant abode in a foreign country, before having paid the due debts, or if he be afflicted with an incurable disease, the debts contracted by him must be paid by the sons and grandsons, even if he has left no property, on account of their being his sons and grandsons. The order of paying is this; In the absence of the father the son, in the absence of the son the grandson; but if the son or the grandson were to deny, that which has been proved by witnesses and the rest [*i. e.* documents] should be discharged. In the first clause, it is said that the debt should be paid off in case the father has gone to a foreign country; but as to the question when it should be paid off, the date fixed by *Nārada* is to be admitted. For *Nārada* says in his *Smṛiti* [I. 3, 14]: "The father, paternal uncle, or elder brother, having travelled to a foreign country, the son [or nephew, or younger brother even] shall not be forced to discharge the debt, until twenty years have elapsed." After the death of the father, the son if he be *aprāptavyavahāra* [*i. e.* if he have not yet reached full age], is not bound to pay the debt; otherwise, if he be fully grown up, he is to discharge it. The time has also been fixed by *Nārada*, for he says [I. 3, 37, 38a]: "A child is comparable to an embryo up to his eighth year; a boy is called youth (*paugandā*) up to his sixteenth year. Afterwards he is of age and independent, in case his parents be dead." He is not bound to pay the debt, even after the death of his parents, though he be independent, being still a boy. For it is said in a *Smṛiti*: "If he have not yet reached full age—*aprāptavyavahāra*—and be independent, he is not bound to pay the debt, because the independence depends on his age, and that age is to be counted by qualifications and the years." The term *aprāptavyavahāra* includes also those that are forbidden to proclaim and to summon (before a court of law). For a *Smṛiti* says: "*Aprāptavyavahāras*, messengers, those that are ready to give alms, ascetics, or those immersed in difficulties should not be proclaimed to or summoned by the king." Therefore it is declared

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(a) See above, p. 625.

in another *Smpiti*: "When the son has reached his full age—*prāpta-vyavahāra*—he should, not caring for his own interest, discharge the debt in such a way that he may not go to hell." As regards the performance of funeral rites (*Śrāddha*), even a boy is admitted. For *Gautama* [II. 5] says: "Except the religious performances in honor of the deceased father, the boy is not allowed to recite Vedic texts anywhere." By the plurality of sons and grandsons spoken of in the first clause it is to be understood, that if there are many, they should discharge the debt each in proportion to his own share, if living separated. And if living united, the head of them all should pay it from the common stock in the proportion of the different debts (*guṇapradhāna*). For *Nārada* [I. 3, 2] says: "After the death of the father, the sons, living separated, shall discharge the debt according to their respective shares, and if living united, he who has taken the burden [of a *paterfamilias*] upon himself, shall pay it." Though, in the first clause, it is said in general that the sons and grandsons shall discharge the debt of the father, still it should be paid by sons with the interest as the father does; the difference being that the grandson should only pay the principal and not the interest. For *Bṛhaspati* says: "The sons must pay the debts of their father, when proved, as if it were their own [*i. e.* with interest]; the grandson has to pay only the principal, while the great-grandson shall not be compelled to pay anything unless he have assets." When proved, signifies when established by the testimony of witnesses. Thus has been shown the liability for debts of the debtor, his son, and his grandson, and to whom it belongs to pay when they exist together.

*Vijñāneśvara's Commentary on Yājñavalkya, II. 175. (a)*

On the Resumption of Gifts. Now, according to the lawful and unlawful way, I mention at large the chapters on law (*vyavahāra*) styled "Non-Resumption of Gifts" (*dattānapākarma*) and "Resumption of Gifts" (*dattāpradānika*). *Nārada* [II. 4, 1] thus mentions the form of *dattāpradānika*: "When a man, having unduly given a thing, desires to recover it, it is called "Resumption of Gift," which is a title of judicial procedure. Resumption of gifts is that title of administrative justice according to which a man wishes to take back a gift which has not been made in a due form [that is, in a prohibited mode] *i. e.* that title of law by which a gift is with-

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(a) See above, p. 759.



drawn which has been made unduly. That title of law is styled "Non-Resumption of Gifts" (*dattānapākarma*) by which a gift cannot be taken back when once given by ways sanctioned by laws. Gifts are four-fold; for *Nārada* [II. 4, 2] says: "In civil affairs, the law of gift is four-fold: what may be given (*deya*), or what may not be given (*adeya*); and what is a valid gift (*datta*), or what is not a valid gift (*adatta*)." An alienable gift is that which is fitting the *dānakriyā* (the action of giving gifts), and which is sanctioned by law. An unalienable gift is that which cannot be given as a gift either because one cannot own it or because its giving is not sanctioned by law. An alienated gift is that which is given away and cannot be taken back because of its being given by one when in a sane state. An unalienated gift is that which can be taken back though once given. Now I mention briefly the four-fold gifts. *Yājñavalkya* [II. 175] says: "Without injuring the family estate, personal property may be given away, except a wife or a son; but not the whole of a man's estate, if he have issue living; nor what he has promised to another." That may be given away which is one's self-acquired property and which has been left after the expenses for the maintenance of the family have been defrayed, because the support of the family is necessary. For *Manu* [VIII. 35] says: "Aged parents, an honourable wife, an infant child must be maintained even by means of a hundred trespasses." Thereupon it has been stated that alienable gifts are of one kind only, namely as regards personal property. What is bailed for delivery, what is let for use, a pledge, joint property, and a deposit: these five have been proved, on the contrary supposition, to be unalienable gifts. For *Nārada* [II. 4, 4, 5] mentions eight unalienable things: "An article bailed for delivery, a thing borrowed for use, a pledge, joint property, a deposit, a son, a wife, the whole estate of a man who has issue living, and [of course], what has been promised to another: the sages have declared unalienable even by a man oppressed with grievous calamities." By saying "these five things are unalienable" is not to be understood that we have only a (mere) claim on these things, since a wife, son, and what has been promised are included in the term "personal property;" but that personal property may be given away, excepting a wife, or a son. If then a son, or grandson, or the like survive, the whole property shall not be given away. For it is said in a *Smṛiti*: "He who has begotten a son and performed his tonsure shall provide for his sustenance." If he has promised a golden piece or the like to somebody, he is not allowed to keep his promise (at the cost of privation to his offspring).

# INDEX.

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	PAGE
<b>ABDUCTION</b> gives no marital right .....	882b
<b>ABEYANCE</b> of an estate not tolerated .....	178
<b>ABSENCE</b> —what constitutes —.....	676
— of a coparcener does not bar partition.....	676, 816
— of a co-sharer, sale during — .....	677c
gift possible during — .....	685c
— in case of partition .....	676
<i>See</i> Absentee ; Emigration .....	3
<b>ABSENT HUSBAND</b> —His wife's competence in Adoption. <i>See</i> Adoption V.....	1071
<b>ABSENTEE</b> —partition not postponed for the return of— .....	677
share of—must be set apart on partition. 676, 801,	816
—may be deposited with his son if fit to take care of it .....	802
— returning, may claim repartition .....	676
— his share made up by deductions .....	792
descendants of — may claim to the seventh degree.....	73, 677, 828b
— represented is bound by partition.....	677
<i>See</i> Partition ; Distribution of Property.	
<b>ACCEPTANCE</b> —indications of — in cases of adoption.....	1088
<i>See</i> Adoption II. 922, 923n ; IV. 1070, 1072 ; VI. 1082, 1084, 1086, 1087, 1089, 1125, 1130, 1146	
<b>ACCRETION</b> —made with aid of ancestral property becomes an- cestral property .....	709
ancestral property, recovered by coparcener, is generally an — and partible.....	718
<b>ACCUMULATIONS</b> —how dealt with on partition .....	723
—by father, when ranked as his separate pro- perty .....	723, 724
when not .....	725
—out of allotments in a Zamindâri are separate property of allottee .....	158, 743
— not rendered joint property by Kulâchâra...158,	743
— by a widow .....	814

	PAGE
ACCUMULATIONS—property purchased by widow out of — from her husband's property goes along with the property ...	315
except perhaps where there is an intention to appropriate separately .....	315, 316
See Savings 158; Widow.	
ÂCHÂRA.....	31
ÂCHÂRYA—See Preceptor .....	137, 144, 481, 496, 500
—— inherits from pupil .....	714
ACKNOWLEDGMENT—of debt .....	102
See Adoption VIII. ....	1236
Manager .....	612
ACQUIESCENCE—of coparceners in alienation by manager binds them .....	749, 750
immovable property recovered with—of copar- ceners ranks as ancestral property .....	718
—— in partition is conclusive .....	702e, 703a
exceptions .....	ib.
—— in holding a lease from a single sharer is presumed after some years from partition.....	779
long — in possession by a mortgagee from father binds son .....	618
—— in adoption by female .....	1089
See Adoption VIII .....	1227
—— in Will by female unadvised .....	1089
—— through misrepresentation or ignorance not bind- ing .....	1227, 1229
- See Ignorance; Estoppel.	
ACQUIRER—See Acquisition 171; Property.....	721, 724
—— other than manager entitled to a double share ...	726a
ACQUISITION— of ownership, means of ...	171
wife's — belongs to her husband .....	91, 292, 301
wife's — by prostitution belongs to her husband	516
—— by father and grandfather inherited by the son alone .....	340
See Son.	
—— by members of joint family, presumed to be joint property.....	720
separate —s. See Property, separate and self- acquired .....	716e, 721
See Burden of Proof; Distribution of Property.	
ACTION—See Cause of Action .....	620b
Suit.	

	PAGE
Acts—pointing to dissolution of union, but not conclusive.	687, 638
Acts in EXTREMIS—closely scrutinized. <i>See</i> Adoption III.....	949
ĀDHIVEDANIKA .....	267a, 268, 291
— is a kind of Stridhana .....	370, 371
a woman may eject her husband from a house given to her by him as — .....	302a
ADHYĀNIKA.....	290
— is a kind of Stridhana .....	267, 370, 371
ADHYĀVĀHANIKĀ .....	290
— is a kind of Stridhana.....	267
ADMINISTRATION OF MINOR'S ESTATE .....	672c, 674e
<i>See</i> Manager ; Widow ; Guardian ; Minor ; Adoption VIII.	
	1223, 1231, 1232
ADMINISTRATOR—suing, to set forth his qualification .....	226e
— had formerly no title against heir.....	225b
estate now vests in — .....	225
<i>See</i> Executor.	
ADMISSIONS—effect of (Adoption) .....	1226ss
— cannot be taken advantage of by stranger to agreement .....	189c
ADOPTED GRANDSON— <i>See</i> Grandson by Adoption.	
ADOPTED GREAT-GRANDSON—succession of.....	71, 651
ADOPTED SON— <i>See</i> Adoption ; Descendants.	
— of father and of (begotten) son, their relative rights .....	372
<i>See</i> Adoption VII.	
— and begotten son, their relative rights .....	373, 388
<i>See</i> Adoption VII.	
ADOPTION—I. <i>Sources of the law of</i> —.....	859ss
comparative unimportance of—in early ages..	859
The Veda of little importance as a direct source.	859
origin of — .....	876
— not allowed in the Bhātele caste, while male kinsmen survive.....	868
importance of custom as a source.....	868
II.— <i>Its Nature and Place in the Hindū System.</i>	
— has attained importance by slow degrees .....	872, 890
— disallowed in many castes .....	1212ss
fosterage preferred to — in several castes.....	ib.
— amongst lower castes recent and but partially allowed .....	919, 926, 1212ss
motive for — .....	872, 875, 901, 902, 905a, 921, 1082, 1103

	PAGE
ADOPTION—II. a single — is a fulfilment of religious duty	
where the Samskâras are performed .....	1148
no kṛtya amongst Jains.....	1050c
——— has with them a different basis.....	ib.
——— is for husband not for wife.....	522
——— of a daughter not allowed .....	873d, 932, 933
place of — formerly filled by levirate and the	
appointment of a daughter.....	877
the adopted is a "reflexion of a begotten son" 883a, 1032	
he must be born of one whom the adoptive father	
could have married .....	886, 1028
daughter's son cannot be adopted except by	
Śūdras.....	434, 886, 887, 919, 1027, 1030
sister's son cannot be adopted except by Śūdras	
434, 887, 888a, 919, 1027, 1030	
orphans cannot be adopted .....	894c, 930g
a parent alone may give in — and to a father	
or his wife .....	895c
an adopted son cannot be given in — .....	895c
effect of — by uncle .....	898
law of — in China .....	899c
——— in Rome .....	905d, 916a, 925c, 930g
——— at Athens .....	916c, 938c
effect of — after investiture (below IV,	
VII). .....	899b
filial connexion depends on the Samskâras .....	938b
reasons why — not more common .....	901b
——— recommended but not enjoined.....	903
in Bombay and Madras, widow may adopt	
without express power .....	904
but cannot be compelled to do so.....	904, 905
does not forfeit her right by her refusal.....	392
coparceners cannot be compelled to assent to	
an — .....	904
assent of coparceners necessary to — according	
to some authorities .....	904d, 1001a
when necessary according to the High Courts ...	ib.
widow must adopt the boy designated by her	
husband .....	904b, 965
——— proper only when the birth of a son becomes	
very improbable .....	905, 930g, 940
——— not indispensable to the attainment of salvation. 905a	

<b>ADOPTION</b> —age for making — is that of discretion or capacity	905 <i>d</i> , 947
personal defects of the son born may justify —	908
his blindness, or dumbness, do not justify —	908, 946
as to insanity.....	<i>ib.</i>
wife of a disqualified person may adopt, by	
custom .....	590 <i>ss</i> , 908
not by the stricter law.....	<i>ib.</i>
—— of an only son is invalid... 908, 909 <i>a</i> , 911, 912, 914	1040
except in Madras and N. W. Provinces.....	909 <i>b</i> , 1042
answers of the different castes on the subject	
of such — .....	909 <i>b</i>
the doctrine of <i>factum valet</i> in — .....	909 <i>a</i>
—— of one of two sons .....	908 <i>f</i> , 911
—— once complete is indefeasible (below VII)... 909 <i>a</i> , 934 <i>i</i>	
both parents ought to concur in giving in —...	910
in some instances, the head of the family may	
perhaps give as such .....	910
mother's assent not indispensable .....	910 <i>c</i> , 1069 <i>ss</i>
—— of the only son of a brother is valid.....	913, 914
—— of the eldest son valid (below IV.).....	915
—— while an adopted son exists invalid.....	916, 917, 944
double — valid according to Sir T. Strange ...	917
but invalid according to other authorities .....	917
<i>See</i> below III.	
—— simultaneous — of two sons void .....	917 <i>g</i> , 281
Śūdra's capacity to adopt discussed.....	919
—— is (perhaps) complete by gift and acceptance, for	
all classes (below VI.) .....	922, 922 <i>g</i>
essential ceremonies in — .....	922 <i>g</i>
laukika — what is .....	922 <i>d</i>
irregular — annulled by castes .....	922 <i>f</i> , 936
a boy defectively adopted is regarded as a dās or	
slave (below VII.) .....	922, 935
difference between — customary and religious.	924
—— by dancing women and	
real .....	933 <i>a</i>
Homa sacrifice marks the completion of —...	934 <i>i</i>
—— severs the boy entirely from his family of birth.	934
other effects of — .....	935 <i>ss</i>
<i>See</i> below VII.	
begotten son takes precedence over adopted.....	935 <i>g</i>

	PAGE
ADOPTION—second — when adopted son declines to fulfil his	
duties .....	938
sanction of Government and grantors of inams,	
to — .....	936a, 955
blood-connexion of the adopted son.....	938
Roman —. Influence of the church on —...	936a
III. <i>Capacity to adopt and its exercise.</i>	
duty to adopt.....	940, 1148
all males may adopt, exceptions .....	940
when the duty arises .....	<i>ib.</i>
any sonless man may adopt .....	<i>ib.</i>
formerly males alone could adopt .....	941
reasons for this .....	<i>ib.</i>
different opinions as to — by women without	
authorization .....	<i>ib.</i>
———— for husband, not for wife .....	<i>ib.</i>
funeral rites are objects of —.....	941, 942, 953
inheritance only a secondary consideration.....	941
———— of wife's sister's son allowed .....	942
———— of daughter's son invalid .....	<i>ib.</i>
proof of — (see below VI.) .....	942a
———— <i>pendente lite</i> .....	942
———— by unmarried persons not prohibited	905, 918, 919,
	943, 943c
———— in South Marāṭhā country .....	905d
———— by a Brahmachāri.....	943c
———— by a sonless widower .....	943
alienation before birth or — cannot be set aside.	943a
———— in life of son or grandson is invalid, exceptions,	
	905, 906, 907, 917, 943, 944, 946
not so as to a daughter .....	943i
double — exceptionally allowed.....	944c
———— during wife's pregnancy allowed .....	945
in case of a prior illegal —.....	<i>ib.</i>
adopted son takes place of begotten one .....	945d
<i>See VII.</i>	
———— a supplementary process.....	945e
insanity of the son enables father to adopt.....	946
he is deemed sonless.....	946b
as to other disqualifications .....	<i>ib.</i>
———— by daughter-in-law.....	342, 372, 946
———— by father-in-law.....	946

	PAGE
<b>ADOPTION</b> — <i>quære</i> , whether expulsion from caste of a son justifies a second —.....	946b
outcast, when restored, succeeds .....	<i>ib.</i>
<i>Capacity in relation to Age</i> .....	947
age of the adopter unlimited .....	<i>ib.</i>
— improper by one under puberty .....	<i>ib.</i>
minor's capacity to adopt .....	948c
<i>Capacity in relation to Intelligence.</i>	
— by men insane, insensible, and in <i>extremis</i> 948, 949, 950	
<i>Capacity as affected by bodily state</i> .....	949, 950
— by leprosy,.....	949
— impotence, blindness, deafness, dumbness, disease. ....	950
<i>Capacity affected by the religious state</i> .....	<i>ib.</i>
by asceticism .....	<i>ib.</i>
pollution.....	<i>ib.</i>
expulsion from caste prevents — .....	<i>ib.</i>
not so according to statute .....	951
persons disqualified for inheritance cannot adopt .....	<i>ib.</i>
— by or for a disqualified person allowed by some castes.....	581a, 951
<i>Rules of particular castes</i> .....	951
— by Nagar Brâhmanas .....	970c
— Vaiśyas .....	951
— Śūdras.....	<i>ib.</i>
— Jains .....	952, 973
— Sarogees .....	973, 997, 1031
— Bhāteles.....	868, 952
— Talabda Kolis .....	927d, 942b
— Sannyâsis and Gosâvis .....	952
— Prabhûs .....	952c, 1029
— Lingâyats .....	<i>ib.</i>
— by <i>delegation</i> .....	952
— by means of wife .....	<i>ib.</i>
— widow .....	953
— daughter-in-law .....	<i>ib.</i>
— by wife of a lunatic .....	<i>ib.</i>
— restriction on this.....	<i>ib.</i>
— to the great-grandfather .....	954
<i>As to assent and permission.</i>	
wife's consent to — not indispensable.....	<i>ib.</i>
as to assent of parents and brothers to an —...	<i>ib.</i>



	PAGE
ADOPTION—assent moved by self-interest deemed insufficient...	1228
sanction of the Court of Wards.....	955
permission of Government not essential .....	955, 956
intimation necessary .....	956
as affecting assessability of land .....	<i>ib.</i>
<i>Adoption by Females.</i>	
maidens cannot adopt.....	956, 957
or be adopted. <i>See</i> daughter .....	932, 933
a wife or widow only can adopt for husband.	957,
	961, 964, 970
a wife only with distinct authority from husband.	957
—— under implied delegation .....	<i>ib.</i>
conditions of effective delegation .....	958
husband affected or not by disease .....	<i>ib.</i>
—— his relations to caste .....	<i>ib.</i>
—— insanity.....	<i>ib.</i>
child to be chosen by him or his wife .....	<i>ib.</i>
<i>by a Widow.</i>	
permission of husband necessary .....	958, 1070
real or assumed.....	958, 959, 970
how replaced.....	958, 959, 962, 963, 970, 1001, 1064 f
amongst Śūdras.....	958
in Bengal .....	959
Madras .....	<i>ib.</i>
the N. W. Provinces .....	959, 960
not prevented by the existence of brothers of	
husband .....	<i>ib.</i>
<i>Age of capacity to authorize an</i> — .....	960, 961
not affected by Act IX. of 1875, Sec. 3 .....	960g
postponement by will of capacity beyond majori-	
ty, questionable .....	961a
son united with father may authorize — .....	961
under authority needs no sanction of relatives ...	<i>ib.</i>
but without authority needs it in undivided	
family .....	961, 970, 974
authority good though insufficient as a will .....	961
during husband's absence .....	<i>ib.</i>
authority and assent requisite to such — .....	962
amongst the Poona Brāhmanas.....	<i>ib.</i>
according to the Bengal law .....	<i>ib.</i>
according to the Benares school.....	962, 963
—— Marāṭhā—— .....	<i>ib.</i>

	PAGE
<b>ADOPTION</b> —forms of authority variable.....	963
deeds of—how construed.....	963, 964
evidence of execution .....	964
express authority sufficient.....	<i>ib.</i>
—————and binding.....	<i>ib.</i>
<i>Positive command to adopt.</i> .....	<i>ib.</i>
duty to adopt.....	<i>ib.</i>
widow's claim under the deed to follow the—	965
directions contrary to law inoperative .....	<i>ib.</i>
permission to adopt one as co-heir void .....	<i>ib.</i>
————— <i>when choice is prescribed</i> .....	<i>ib.</i>
rule in Bombay.....	<i>ib.</i>
———— Bengal .....	<i>ib.</i>
————— prescribed of a boy unborn.....	<i>ib.</i>
when he is named .....	<i>ib.</i>
————— when person adopted dies .....	966
<i>Qualified discretion</i> .....	<i>ib.</i>
when the authority prescribes classes alterna-	
tively.....	<i>ib.</i>
<i>Complete discretion</i> as to person .....	<i>ib.</i>
duty of widow authorized .....	967
<i>Conditional authority</i> .....	<i>ib.</i>
—————according to the law of Bengal	<i>ib.</i>
————— in Madras	<i>ib.</i>
alternative authority .....	966
<i>Implied authority</i> .....	952, 968
when it arises .....	968
<i>Express or implied dissent of husband</i> .....	968, 969
positive prohibition .....	969
implied prohibition .....	<i>ib.</i>
assent assumed where not excluded .....	970
its necessity affirmed and denied .....	972
the Marāṭhā doctrine as to widow's authority	970,
971, 972, 975, 1001ss	
unfettered power of a widow of a divided member	974
doctrine of the Vīramitrodaya .....	971f
assumed permission only to give in Bengal .....	972
express authority of husband not needed.....	973
————— in the Dravida country .....	974
————— among the Jains .....	<i>ib.</i>
son adopted by mother-in-law yields to one	
adopted by daughter-in-law .....	<i>ib.</i>

	PAGE
ADOPTION—a conscientious obligation of the widow .....	974, 975
her choice in — limited .....	975, 1148
obligation not enforceable .....	974, 975, 1011
——— from religious motives valid .....	975
duty of Sapindas of husband.....	975c, 1001ss
adopting widow must be a free agent.....	975, 997
<i>Time for — by a widow</i> .....	975, 976
not precisely limited .....	964, 970
preference for — of husband's Sapindas .....	976
——— of strangers not invalid .....	977
<i>Authority in case of two or more widows</i> .....	ib.
the eldest has a prior right .....	413, 977
unless disqualified .....	977, 978
or she has resigned to the younger .....	978
when each has a direction to adopt .....	ib.
<i>Circumstances in which a widow may adopt</i> ...	978, 979
<i>Successive</i> adoptions .....	980
authority to adopt on death of son limited .....	979
“if necessary” to be understood.....	980, 981
——— with consent of kinsmen ...	980, 981, 986, 989, 1000ss
a presumptive heir not allowed to challenge a	
second — .....	980
——— <i>Simultaneous</i> —s invalid .....	981
——— by woman having step-son is void .....	522, 977e, 979
<i>Circumstances barring adoptions by widow</i> .	
as in the case of the husband .....	981, 991
can an — <i>defeat a vested interest</i> ? Question dis-	
cussed.....	368, 982, 983
principles of Hindū law as to perpetuation of the	
<i>sacra</i> .....	983, 984, 988, 989
——— opposed to — by a mother to her son .....	984
except on death of son an infant.....	984, 985
need of the sanction of unseparated kinsmen. 986—989	
case where a united son dies childless before his	
father .....	987
when father-in-law can and cannot adopt .....	ib.
on his death this right passes to his son's	
widow.....	987, 988
widow of the last coparcener may adopt .....	988
but cannot control other widows.....	988, 989, 994
male relatives only have control .....	988d, 989
this is the doctrine of the Nirṇayasindhu .....	989

	PAGE
<b>ADOPTION—male relatives only have control—</b>	
this is the doctrine of the <i>Saṃskāra</i> kaustubha...	989
Dharmasindhu .....	<i>ib.</i>
Vyavahāra Mayūkha..	<i>ib.</i>
authority inoperative against son's successor	991, 993
the right co-exists with union of family .....	995
ruling to the contrary.....	<i>ib.</i>
——— by predeceased son's widow .....	<i>ib.</i>
though his sister survives .....	<i>ib.</i>
<i>Widow's capacity as affected by age</i> .....	996
maturity generally necessary.....	930 <i>g</i> , 996
ceremony at least after maturity.....	996, 997
by infant widow when directed by husband .....	997
——— amongst Sarogees.....	<i>ib.</i>
——— under pressure invalid.....	<i>ib.</i>
<i>Capacity affected by personal conditions</i> .....	<i>ib.</i>
intelligencerequired as for other religious acts	997, 1064 <i>f</i>
widow disqualified by leprosy and unchastity.....	998
——— by widow under puberty exceptional.....	<i>ib.</i>
——— none by untonsured widows of Brāhmaṇas.....	<i>ib.</i>
<i>Capacity annulled by remarriage</i> .....	999
<i>Consent required</i> .....	<i>ib.</i>
none where there is express authority.....	999, 1001
——— in case of two widows .....	999, 1001
consent of mother-in-law not necessary .....	1000
consent of husband's kinsmen when necessary	1000, 1001
law in Bengal.....	1000, 1001, 1003
——— Madras .....	1000, 1001, 1003
——— Bombay .....	975, 988, 1003, 1004, 1010
Dattaka Mimāṃsa exacts living husband's autho- rity .....	1001
what assent suffices .....	1003, 1004
effect of kinsmen's dissent not absolute .....	1005
<i>Consent of the caste to</i> —.....	1005, 1006, 1064 <i>f</i>
meaning of <i>jñāti</i> .....	1006
<i>Assent of persons affected in interest by an</i> — ...	<i>ib.</i>
its necessity results from widow's dependence ...	1007
not a right of property .....	1007 <i>c</i>
<i>Consent of Government to</i> —.....	1009—1011
its confirmation cures defects .....	1011
<i>Omission or postponement of</i> —.....	<i>ib.</i>



	PAGE
<b>ADOPTION—</b> <i>Relation through the natural father</i> .....	1023
in case of a widow adopting .....	<i>ib.</i>
order of choice in Punjáb .....	1023e
— according to custom in the Dekhan .....	1023
— the castes in Poona... ..	1024
— Khandesh .....	<i>ib.</i>
son of a half-brother may be chosen .....	<i>ib.</i>
uncle not limited in — to nephew.....	1025
preference a matter of discretion .....	1025, 1038
but not allowed by Śāstris to widow .....	1025
except in case of injunction by husband .....	<i>ib.</i>
or assent of husband's relatives.....	1026
—— by Śūdra widow .....	<i>ib.</i>
—— when nephew refused .....	<i>ib.</i>
<i>Relation through the son's natural mother.</i>	
usually makes adoption impossible .....	1027
except among Śūdras .....	<i>ib.</i>
but allowed in case of necessity.....	1027b
—— in case of a putrikā-putra. (See above II.) .....	1027
son of a daughter, sister, or mother ineligible for —— (See above II.) .....	1027, 1030.
<i>contra</i> .....	1030
and son of a mother whom adopter could not marry .....	886, 1028
but only in the higher castes .....	1028
<i>factum valet</i> not applicable .....	<i>ib.</i>
son of a sister-in-law may be adopted by a Brāh- maṇa .....	1064
—— of sister's son invalid .....	1028h
son of father's brother's daughter unfit for ——...	1062c
sister's son unfit in the Dravida country ...	1023, 1029
— Andra —— .....	1028
— N. W. Provinces .....	<i>ib.</i>
— Punjáb.....	1028 h, comp. 1029
—— among Prabhūs .....	1029
—— of husband's brother's grandson valid.....	<i>ib.</i>
—— of first cousin's daughter's son upheld.....	<i>ib.</i>
—— of husband's sister's son? .....	1030
invalid —— not to be questioned by a sister's son .....	<i>ib.</i>
—— of daughter's son in South Marāṭhā country.....	<i>ib.</i>
—— amongst Jains.....	1031
—— of son of niece .....	<i>ib.</i>

	PAGE
<b>ADOPTION</b> —of son of second cousin .....	1031
— of wife's sister's son .....	<i>ib.</i>
— of first cousin, paternal or maternal .....	<i>ib.</i>
<i>Relation between the son to be adopted and the adoptive mother.</i>	
restrictions imitative .....	1032
the doctrine of a possibility of union between adoptive mother and real father .....	<i>ib.</i>
— by widow, of her brother's son illegal 1033, <i>contra</i>	1034
— of her uncle's son not valid .....	1033
— of wife's brother not allowed..... 1033, <i>contra</i>	1034
a half-brother cannot be adopted .....	1034
connexion between real and adoptive mothers no obstacle to —.....	<i>ib.</i>
<i>Family connexion amongst Śūdras.</i>	
— among the lower castes .....	<i>ib.</i>
— influenced by the practice amongst the Brāhmaṇas .....	1035
the Śūdras strictly have no sacra .....	1036
relaxation in favour of Śūdras .....	<i>ib.</i>
consanguinity no obstacle .....	<i>ib.</i>
a brother's or sister's or daughter's son eligible for —.....	434, 1037
— of one of the last two a duty .....	1037, 1038
— amongst Vaiśyas (Madras) .....	1037
— Jains .....	1038
— of sister's son by Wānis .....	<i>ib.</i>
— ———invalid in Bengal .....	<i>ib.</i>
— ———allowed in Maithila.....	<i>ib.</i>
— of daughter's illegitimate son .....	<i>ib.</i>
— of mother's sister's son valid among Śūdras .....	<i>ib.</i>
— of sons of female blood relatives .....	<i>ib.</i>
— of nearest relatives not obligatory .....	<i>ib.</i>
— of uncle or an elder forbidden .....	<i>ib.</i>
— by a Mhār of cousin's son .....	<i>ib.</i>
— of Asagotras .....	<i>ib.</i>
— from illegitimate branch of the family.....	<i>ib.</i>
<i>Relation of the son to his family of birth.</i>	
— of only son.....	909, 912, 1039, 1040, 1041, 1069
— eldest son .....	915, 1039
— an orphan .....	894e, 1039
— of son self-given .....	895, 1039

PAGE

<b>ADOPTION</b> —giving in — by an elder brother condemned	930,
	1039, 1040
no formula for transferring an adopted son .....	1040
parents cannot sell, give, or desert an <i>only son</i>	1041a
	1069
exception in case of — of an only son by paternal	
uncle or his widow.....	897, 909, 912, 1040, 1041, 1044
valid in the N. W. Provinces.....	910, 1042
principle of <i>factum valet</i> applied .....	1042
and occasionally in Bengal .....	1043
<i>contra</i> , opinion of the Śāstris.....	1042
———except under special caste custom.....	1043
sole remaining son deemed an only son .....	1042
caste laws in Bombay opposed to — of only son	<i>ib.</i>
among the Lingāyats .....	<i>ib.</i>
only <i>the giving</i> of an eldest son is prohibited .....	1044
——— of only son of a brother in Maithila.....	1045
——— as a <i>dvyāmushyāyana</i> .....	1041
an agreement at — necessary to constitute a	
<i>dvyāmushyāyana</i> .....	<i>ib.</i>
presumption of this in — by a Brāhmaṇa from	
a different gotra .....	1045
similarly in — of an only or eldest son .....	1045d
the presumption in such —s .....	<i>ib.</i>
———nullifies the rule that	
an only son can be given only to his uncle.....	1045a
<i>Eldest son.</i>	
case of <i>eldest</i> distinguished from that of an <i>only</i>	
son.....	914, 915, 1046
gift of either opposed by the Mitāksharā and	
the Vyavahāra Mayūkha .....	1046
the Datt. Mīmāṃsa and the Datt. Chandrika	
silent as to eldest.....	<i>ib.</i>
his — allowed in Bombay.....	1047, 1049
though censurable .....	1047
and in Bengal .....	1048
—— Madras.....	<i>ib.</i>
the opinions of the Bombay Śāstris various .....	<i>ib.</i>
——— of a second son not invalidated by the death	
of elder .....	1049
gift of <i>youngest</i> son disapproved in the Dekhan	<i>ib.</i>
but not condemned by any authority .....	1050



- ADOPTION**—gift of youngest son even to a man of a different gotra is not forbidden ..... 1050
- Family of birth—amongst Śūdras.*
- propinquity gives rise to restrictions ..... *ib.*
- of an only son among Śūdras disapproved... 1050, 1051
- the Lingáyats disallowed  
1042, 1051
- by a Śūdra allowed in Bengal ..... 1051
- a mother can give her son in — to her brother 1051
- Fitness as affected by Personal Qualities—Sex.*
- daughters are not to be adopted ..... 1052
- except by special caste rules ..... 1052, 1053
- of a sister, illegal ..... 1053
- a sister's daughter or son cannot become a  
putrikā-putra ..... 1053
- Fitness for Adoption—Age.*
- opinions vary as to the proper age of the boy to  
be adopted..... 1053, 1057
- so do caste rules ..... 1054
- he should be young ..... *ib.*
- amongst Brāhmanas ..... *ib.*
- Kshatriyas ..... *ib.*
- Vaiśyas..... *ib.*
- Śūdras ..... *ib.*
- age of majority ..... *ib.*
- the native lawyers as to the age of — ..... *ib.*
- the rule in the N. W. Provinces ..... *ib.*
- Bombay..... 1054, 1055
- Juniority of Adopted Son to Adoptive Father.*
- the adoptee should be junior to the adoptive  
father or mother ..... 1055
- Birth after Adoptive Father's Death.*
- a boy not born in the life-time of adoptive father  
can still be adopted by his widow ..... *ib.*
- Identity or Difference of Family or Gotra.*
- sense of "gotra" when used in connexion with  
the lower castes ..... *ib.*
- in —s by Śūdras no obstacle or preference  
arises from consanguinity ..... 1056
- when gotras differ ..... *ib.*
- when they are the same ..... *ib.*

	PAGE
<b>ADOPTION</b> —the order of preference amongst Brāhmanas .....	1056b
the son of a uterine brother .....	ib.
any sagotra-sapinda.....	ib.
asagotra sapinda .....	ib.
a sapinda of the same gotra .....	ib.
———— of a different gotra.....	ib.
the ceremonies of jātakarṇa and chūḍākaraṇa ...	ib.
a bhinna gotraja to be adopted before his upa- nāyana. <i>Contra</i> .....	ib.
the saṃskāras not to have been performed in— from a different gotra.....	1057, 1058
———— of a married sagotra in the Dekhan allowed .....	1057
limitation of age necessary in case of — of a stranger.....	ib.
<i>Fitness as affected by Bodily Qualities.</i>	
———— leprosy or blindness disqualifies for — .....	1058
so does lameness .....	1058c
<i>Mental Qualities.</i>	
———— idiocy or insanity disqualifies for — .....	1058
<i>Religious and Ceremonial Qualities.</i>	
inseparableness from family of birth discussed.	1058, 1059
whether a married man adoptable .....	1059, 1060c, 1062, 1065
exception .....	1065
upanāyana an obstacle to — .....	1059, 1060c, 1062, 1065
exception, Bombay .....	1065
———— should be before tonsure.....	928
except within the same gotra .....	930
———— after tonsure.....	1060
tonsure no obstacle in Bombay .....	1060c
nor initiation.....	1059
Śāstris' views in cases of — .....	1060
———— to be before the boy is five years old .....	ib.
reason.....	1064f
effect of tonsure barring — how undone ? .....	1060
———— after five years when valid .....	1064f
a sagotra may be adopted even after five years of age and tonsure.....	1060, 1061
<i>Investiture with the Sacred Thread.</i>	
———— to take place before boy's munj.....	1061, 1062, 1064
———— when gotra differs .....	1061

	PAGE
ADOPTION—	
a Brāhmaṇa boy cannot be adopted after munj.	1062
except from sagotras.....	1065
such an — confers no heirship ...	1062
rule in Madras .....	ib.
a Brāhmaṇa, after chūḍākārṇa and the upanā-	
yana not disqualified for — in Bombay	1063, 1065
of a boy eight years old and before initiation held	
valid in Bengal .....	1063
so when the chūḍa was performed .....	ib.
contra notwithstanding an agreement.....	ib.
<i>Fitness—as affected by Marriage.</i>	
after marriage impossible.....	1063, 1064, 1065
contra according to the Poona Śāstris .....	1064
in case of a sagotra .....	1065
the rule in Bengal .....	ib.
———— Madras .....	1066
a married man of the same gotra only can be	
adopted .....	1065
of such a married man having a family admis-	
sible .....	1051e, 1064, 1064f
married men generally fit for — amongst Śādras	929
but not among other castes.....	930
the rule in Bombay .....	1065
———— Bengal .....	ib.
———— Madras .....	1066
<i>Fitness—Place in Caste of the Adopted Son.</i>	
exclusion from caste prevents an — in the Dekhan	ib.
<i>Fitness—In case of Anomalous Adoptions.</i>	
no variance in the choice of the boy.....	ib.
defective filial relation between dvyāmushyāyana	
and his adoptive father .....	ib.
of a sister's or a daughter's son as a dvyāmushy-	
āyana .....	ib.
in the Chetty caste — is necessary to constitute	
the sons of daughters lawful heirs .....	1067
<i>Fitness—In case of Quasi-Adoptions.</i>	
in the kṛitrīma form of — .....	ib.
no restrictions on the choice of the son .....	ib.
his express consent necessary .....	ib.
of an only son is lawful as a kṛitrīma .....	1067f
no restriction on the choice of the boy in —s	
in use in Gujarāt .....	1063

	PAGE
ADOPTION—of a daughter or foster daughter not recognized..	1068
no — in families governed by the <i>Alyā Santāna</i>	
law .....	<i>ib.</i>
— amongst <i>kalavāntins</i> a matter of free choice .....	<i>ib.</i>
V.— <i>Who may give in Adoption and when.</i>	
<i>The capacity limited to the Parents.....</i>	1069—1073
even in case of an adult .....	930
concurrence of both parents necessary to gift of a	
son in — .....	1064 <i>f</i> , 1069
after father's death mother competent to give	
in — .....	1087
mother has no control over the gift by husband	
in — .....	1069
widow's capacity to give in — .....	1069, 1071
recognized by <i>Vasishṭha</i> and other <i>Smṛitis</i> .....	1069, 1072
husband singly may give in — .....	1070
wife under husband's delegation may give in —	<i>ib.</i>
and a widow without his authority .....	1070, 1071
doctrine of the <i>Mitāksharā</i> .....	1071
<i>Bālabhaṭṭa</i> favours the right of females .....	<i>ib.</i>
mother's assent desirable not indispensable .....	1072
the rule laid down by the <i>Vyavahāra Mayūkha</i> ...	<i>ib.</i>
<i>Vasishṭha</i> authorizes woman's independent ac-	
ceptance of a son.....	<i>ib.</i>
and a gift by her .....	<i>ib.</i>
the view of the <i>Vīramitrodaya</i> .....	<i>ib.</i>
widow's authority conditioned by husband's spi-	
ritual interests .....	1073
grandfather or brother cannot give in — .....	<i>ib.</i>
orphan cannot be adopted .....	<i>ib.</i>
<i>Gift by the Father.—Father's personal competence.</i>	
leper (in Bengal) can give in — .....	1074
the practice in Bombay .....	<i>ib.</i>
<i>Circumstances in which the Gift may be made.</i>	
a gift of a son morally objectionable unless made	
in distress .....	<i>ib.</i>
but a gift in — by a competent parent always	
effectual .....	1075
a gift is not invalid through absence of poverty...	<i>ib.</i>
grounds of the limitation of authority to give ...	1075 <i>f</i>
<i>Qualifications of the Power.</i>	
consent of mother desirable .....	1075

	PAGE
ADOPTION—intelligent boy's assent to — necessary.....	1075
inferred from his submission.....	<i>ib.</i>
information to relatives necessary .....	1076
their consent and that of caste merely desirable. <i>ib.</i>	
consent of Government thought necessary to	
—s by Saranjāmdārs, &c.....	<i>ib.</i>
<i>Gift by the Mother—as a Wife—by express permission</i>	
<i>of Husband.</i>	
— wife's giving and taking in — without hus-	
band's permission prohibited .....	<i>ib.</i>
his <i>express</i> permission thought necessary for a gift <i>ib.</i>	
<i>Husband's implied assent.</i>	
husband's <i>express</i> permission probably not indis-	
pensable .....	1077
but no gift against his <i>express</i> or implied will ...	<i>ib.</i>
conditional assent.....	<i>ib.</i>
assent of an insane husband needless .....	<i>ib.</i>
<i>Gift by Widow.</i>	
after father's death mother's power to give	
dependent on authority from him .....	<i>ib.</i>
or a discretion subject to his will.....	1077, 1078
the narrower view of widow's capacity illustrated. 1078	
widow's rights most restricted in Bengal .....	<i>ib.</i>
assent of father to a <i>gift</i> presumed there when	
there is no dissent .....	<i>ib.</i>
and in Bombay except where he would be spiri-	
tually prejudiced .....	1079
in Madras assent of relatives replaces that of	
deceased husband .....	<i>ib.</i>
— assent of elder son desirable and once	
thought sufficient .....	1079, 1080
the widow being spiritually dependent on elder son 1080	
<i>Gift by persons incompetent—By Adoptive Parents.</i>	
gift by adoptive parents not warranted .....	<i>ib.</i>
such a gift guarded against by Roman Law.....	1080 <i>f</i>
gift by real parents implied in prescribed cere-	
monies.....	1080
<i>Persons commissioned by the Parents.</i>	
parents cannot authorize gift after their decease. <i>ib.</i>	
<i>By Grandfather, Brother, &amp;c.</i>	
grandfather cannot give when the boy's father is	
dead and mother living .....	1081

	PAGE
<b>ADOPTION</b> —gift by brother alone not upheld .....	1055b, 1081
the practice in the Panjāb.....	1081b
a brother cannot give in — even with father's consent .....	1081
<i>Self-Gift.</i>	
the only son of one deceased cannot give himself in — .....	<i>ib.</i>
the Svyamdatta not to be recognized in the kali-yug .....	<i>ib.</i>
the kṛitrima or kartā putra an exception .....	<i>ib.</i>
such —s allowed only in Maithila ...	<i>ib.</i>
<b>VI. The Act of Adoption—Its Character and Essentials.</b>	
—— is essentially a religious act .....	1082
the rights of property connected with sacra .....	<i>ib.</i>
ceremonies of <i>putreshti</i> and <i>datta homa</i> important.....	1082, 1083
—— among the mixed and lower castes .....	1083
no purely religious rite absolutely indispensable. ....	<i>ib.</i>
formerly gift and acceptance alone requisite .....	1084
and still sufficient even amongst Brāhmaṇas in Madras .....	<i>ib.</i>
in Bombay essential ceremonies insisted on .....	<i>ib.</i>
essential ceremonies enumerated.....	1085, 1124, 1125
sacrifice not essential .....	922g
omission of ceremonies a cause of suspicion .....	<i>ib.</i>
<i>The Act of Adoption—as to the Gift.</i>	
gift of boy with any reserve not valid .....	1085
the ceremonies are intended to effect a complete transfer .....	1086
the <i>patria potestas</i> of adoptive father restricted under the Roman Law .....	1086c
mere engagement does not constitute — .....	1086, 1090
nor invalidate a subsequent — ceremonially made .....	1086
gift and acceptance essential ...	1086, 1087, 1088, 1094
actual transfer necessary .....	1086
particular formula not prescribed.....	<i>ib.</i>
nor that it should be in writing.....	<i>ib.</i>
expressed intent to give and take only necessary. ....	<i>ib.</i>
declaration only by the adoptive father ineffectual .....	1087
delivery with requisite declaration completes — .....	<i>ib.</i>

	PAGE
ADOPTION—gift must be expressly <i>in adoption</i> .....	1088
adopted son to be given, not sold .....	1087
assent of natural father legally necessary .....	1088
but mother's only morally necessary .....	<i>ib.</i>
assent of adoptive father alone suffices .....	<i>ib.</i>
salutation as an indication of acceptance .....	949, 1088e
<i>The Act of Adoption—as to the acceptance.</i>	
acceptance a cause of filiation.....	1088
evidence of giving and taking necessary.....	<i>ib.</i>
free consent of giving and receiving parents in-	
dispensable.....	1089
gift and acceptance not to be replaced.....	<i>ib.</i>
<i>ex. gr.</i> by education and nurture .....	<i>ib.</i>
even among Śūdras.....	<i>ib.</i>
<i>The Act of Adoption—Assent of the Son.</i>	
adopted to be of the same class and affectionately	
disposed .....	1090
never taken against his will .....	930, 931, 1090
<i>Contract of Adoption.</i>	
agreement to adopt survives the parties.....	1090
husband's reference to it authorizes wife to adopt .....	<i>ib.</i>
such agreements not specifically enforced .....	<i>ib.</i>
association by adopted son of another with him-	
self does not constitute .....	1091
<i>Proof of the transaction.</i>	
principles of evidence of —.....	<i>ib.</i>
strong evidence necessary to displace widow or	
daughter .....	1092
writing not necessary .....	955, 1095
husband's permission being proved slight proof	
of ceremonies required.....	1092
not so conversely.....	<i>ib.</i>
satisfaction of requirements of Hindū law must	
be proved .....	<i>ib.</i>
performance of extraneous sacraments not suf-	
ficient .....	<i>ib.</i>
nor mere acquiescence of widow .....	<i>ib.</i>
proof of actual — failing, long possession of no	
avail.....	1093
so as to mere residence and general recognition. ....	<i>ib.</i>
nurture as a foster-child is not adoption .....	<i>ib.</i>
requirements as to proof not technical .....	<i>ib.</i>

**ADOPTION—Presumption in favour of Adoption.**

presumption in favour of — when arises	1094,
	1095, 1096
performance of ceremonies to be presumed	1095
presumption when — is opposed to law	1096
subsequent conduct does not make that an —	
which was not one	1096d
— of sapinda without ceremonies pronounced valid	1097
brother preferred to sister's son acknowledged	
without ceremonies	547
<i>Estoppel.</i>	
presumption in favour of an invalid — when	
countenanced	1097, 1098
recognition by one of another as his son creates	
estoppel	1097
and admission of the title of an adopted son	ib.
so do acts inducing adoptive father to believe in	
the validity of an —	1098
acquiescence in an — and association with the	
boy deemed sufficient	ib.
in Madras mere consent to an — held an	
estoppel	ib.
acquiescence in an — through mistake no	
estoppel	1098, 1099
and cannot validate an invalid —	ib.
widows completing an act of — held bound	
by it	ib.
<i>Ratification.</i>	
ratification of — by widow or male sapindas	1099
cannot set up a void —	1100
doctrine of ratification not applicable to such	
a case	1100c
<i>Limitation.</i>	
to suit for declaring an — invalid	1100
omission to sue does not validate a void —	ib.
status not lost by particular omission to sue	ib.
<i>Terms annexed to Adoption.</i>	
rights by — how far variable	187d
— subject to condition of defeasance impossible	1101
so as to mancipation under the Roman Law	1101c
but terms as to property are annexed to —	1102
— commonly by widows adopting	ib.



	PAGE
ADOPTION—Terms, how far binding on the adopted son .....	1102
effect given to them though disapproved by the Śāstris .....	<i>ib.</i>
son adopted as an adult bound to fulfil accepted terms .....	1103
assent of adopted son to contingent defeasance void .....	1103c
terms made in —s by males .....	1103
Roman Law as to such terms .....	1104a
limitations annexed to —s considered null by the Śāstris.....	1104
as <i>ex. gr.</i> that adopting widow should have management .....	<i>ib.</i>
son bound only morally; and not in case of waste.	1105
such terms annexed in <i>kritrima</i> —s.....	<i>ib.</i>
and capable of ratification by son at majority ...	<i>ib.</i>
usage sanctions terms for protection of widows...	1106
husband may annex terms to his permission to adopt .....	1106, 1114
or make dispositions which affect an — ...	1107, 1114
with reserve for wife and daughter .....	1107
under a will limiting the boy's estate .....	<i>ib.</i>
— by widow with husband's instructions thought to invalidate his will .....	<i>ib.</i>
the adopted takes by inheritance, not devise.....	1108
accompanying terms written or oral .....	<i>ib.</i>
terms held not binding in Madras .....	1109
a compromise of <i>sapindas'</i> claims upheld .....	1109a
widow (in Bombay) may reserve part .....	1109
husband's limitations of estate of widow and adopted son recognized in Calcutta .....	1109, 1110
———if accepted by boy's real father .....	1110a
they may give the widow a life interest .....	1110
analogous to settlement .....	1110b
opinions of the Śāstris.....	1110
“absolute control” may mean only management for the son .....	1110c
questions arising from uncertainty as to the person to be adopted .....	1110
— by a sonless man does not affect previous disposal of property ...	641c, 1111
but limits testamentary power .....	<i>ib.</i>

	PAGE
<b>ADOPTION</b> —use of a <i>mṛityu-patra</i> .....	1111
adopted son should on theory take estate as an aggregate .....	1111, 1114
but widow may impose protective terms ...	1112, 1114
whether dowered widows adopting must necessarily defeat their own estate .....	1113
grounds of the capacity discussed .....	1114
the older authorities agree with the Śāstris .....	1115
the recent ones agree with the usage in Bombay <i>ib.</i>	
cases discussed .....	1115, 1116
Colebrooke's opinion .....	1116
<i>Assent as a valuable consideration.</i>	
assent of boy to be given is a valuable consideration .....	1015, 1116
as against giving family .....	<i>ib.</i>
— receiver .....	1117
natural parents not to contract for their own benefit .....	<i>ib.</i>
nor can <i>sapinda</i> s .....	<i>ib.</i>
persons who must attend at an — enumerated ...	1118
analogous practice at Rome .....	1118a
persons to be invited at an — enumerated .....	1118
<i>Persons taking part in the act—The Parents giving.</i>	
the giver and receiver to be present .....	<i>ib.</i>
adopter must personally take the boy .....	<i>ib.</i>
mother's presence not indispensable .....	1119
deed insufficient to constitute — .....	<i>ib.</i>
declaration of gift can be made by the giving parent only .....	<i>ib.</i>
parents need not consult relatives .....	<i>ib.</i>
corporeal delivery of boy may be made by deputy <i>ib.</i>	
<i>The Parents taking.</i>	
husband and wife should be present, and a Brāhmaṇa to make oblation to fire .....	1120
or wife alone under delegation .....	<i>ib.</i>
facts indicating delegation .....	<i>ib.</i>
— when one of the adoptive parents is dead .....	<i>ib.</i>
no — when both are dead .....	<i>ib.</i>
<i>Presence of the Child given necessary</i> .....	1121
he may dissent .....	<i>ib.</i>
<i>Presence of Relatives.</i>	
to be sought but not indispensable ...	1121 and note <i>ib.</i>

ADOPTION—*Anomalous Adoptions.*

in <i>quasi</i> —s no forms necessary except expressed assent.....	1121
in <i>kṛitrīma</i> —s consent of the boy essential.....	<i>ib.</i>
and of boy's parents.....	<i>ib.</i>
<i>External conditions—Publicity.</i>	
public transfer and religious rites requisite to—	<i>ib.</i>
notice of — to sagotra-sapindas and to the Rāja or chief local officer enjoined .....	1122
— deed to be signed by the relations .....	<i>ib.</i>
such intimation and publicity not absolutely essential .....	<i>ib.</i>
<i>Time for Adoption.</i>	
an auspicious day.....	<i>ib.</i>
declaration by daylight .....	<i>ib.</i>
<i>Place for Adoption.</i>	
usual place of residence desirable, not necessary.	1123
so of sacrifice in adopter's house .....	<i>ib.</i>
<i>Ceremonies constitutive—Amongst Brāhmanas.</i>	
demand, invitations, notice, gift, sacrifice, investiture .....	<i>ib.</i>
putreshti not essential to — .....	1124, 1126
rites prescribed by Vyav. Mayūkha.....	<i>ib.</i>
simple forms ordained by Vasishṭha .....	1125
forms regulated by custom.....	<i>ib.</i>
economy of forms favoured by the Courts .....	<i>ib.</i>
whether mere gift and acceptance enough not certain.....	<i>ib.</i>
datta homa thought essential.....	954, 1125, 1126
not amongst classes imitating the Brāhmanas ...	1131
isolated exceptions amongst Brāhmanas.....	<i>ib.</i>
Jala Sankalpa .....	1119, 1126
placing in adopter's lap. ....	949c, 1126
sniffing the head, Aghrāna .....	949c
mere declarations pronounced insufficient... ..	1126, 1127
so of performance of obsequies .....	<i>ib.</i>
<i>Abridged Ceremony for one in extremis</i> .....	1127, 1128
no — by will .....	964, 1127g
ceremonies exacted in case of adults.....	1128
ceremonies begun by dying husband completed by widow .....	1128, 1129
Jagannātha's views .....	1291

	PAGE
ADOPTION—investiture in adoptive family thought essential	
by Colebrooke.....	1129, 1130
vicarious ceremonies in lower castes .....	1130
mere gift and acceptance enough in Madras .....	<i>ib.</i>
observations of Judicial Committee.....	1130e
exceptional dispensations in Bombay .....	1131
<i>In adopting Sagotras.</i>	
sacrifices may be omitted.....	930a, 1131, 1132
though religiously prescribed .....	1132
<i>Adoption after tonsure.</i>	
ceremonies necessary ... ..	1133
sacrifice annuls effects of tonsure (Datt. Mīm). ..	1134b
<i>In adopting as Dryāmushydyana.</i>	
additional formula used .....	1134
<i>Ceremonies constitutive—Amongst the lower castes.</i>	
sacrifice not needed .....	921, 1134, 1135a
———— but desirable .....	1137
except perhaps in Bengal.....	1135a, 1137
all castes below Brāhmanas placed on the same	
level.....	1135c
a Gosāvi to adopt without Vedic rites.....	921
cases of — without sacred rites.....	1136
<i>Subsidiary Forms</i> .....	1137
writing needless .....	1138
but usual .....	1139
insufficient by itself.....	<i>ib.</i>
no invariable form .....	<i>ib.</i>
clear evidence to be insisted on.....	<i>ib.</i>
mere intention insufficient .....	<i>ib.</i>
case of invalidity for defect of forms .....	1140
<i>Informalities</i> .....	<i>ib.</i>
a cause of invalidity.....	<i>ib.</i>
in Madras immaterial .....	1142
unintentional omission not fatal .....	1140
except perhaps of all ceremonies .....	1141
defect of forms but not of essence remediable ...	<i>ib.</i>
omission raises presumption against — .....	1142
<i>Ceremonies—Collateral</i> .....	<i>ib.</i>
donations to Brāhmanas.....	<i>ib.</i>
presents to the child .....	<i>ib.</i>
<i>Authentication</i> .....	<i>ib.</i>
instruments thought indispensable by some castes	<i>ib.</i>

	PAGE
ADOPTION—distribution of sweetmeats, &c.,.....	1134
<i>Ceremonies—Variations in Quasi-Adoptions.</i>	
nitya and anitya — in Madras .....	<i>ib.</i>
kṛita —s disallowed .....	1143, 1146
imitated by ascetics.....	1143
and in Gujarāt .....	1144
comparison of Roman law .....	1146d
kṛitrima — mere gift and acceptance .....	1143
mere assent makes a foster son.....	1144
mere nurture held to make an heir .....	<i>ib.</i>
and recognition in case of a dancer.....	<i>ib.</i>
VII.— <i>Consequences of Adoption—Perfect, General Effects,</i>	
<i>Change of Status</i> .....	1145
effect of complete — amongst the twice-born...	938
gift in — extinguishes filial and paternal rela-	
tions .....	365a, 1087
relation to family of birth annulled .....	1145
——— causes complete severance from family of birth...	365a
whether consanguinity ceases with — discussed	1022
law in Maithila .....	<i>ib.</i>
—— the Andra country .....	<i>ib.</i>
relation to adoptive family completed by initia-	
tion .....	1145a
——— confers right to inherit .....	58
adopted becomes like a begotten son .....	367c, 1145
rights subject to partial defeasance .....	1149
adopted son does not replace disqualified father ?	
	577, 580
——— not to be disinherited .....	584
only one — allowed at a time.....	1146
except on refusal or incapacity of adopted son to	
fulfil duties .....	1166
adoptive mother's interests gradually developed.	1147
her ancestor's interest.....	<i>ib.</i>
son includes adopted son in Succession Act .....	1148
<i>Change of Sacra</i> .....	1147
the most important result of — .....	<i>ib.</i>
deliverance from <i>Put</i> effected by single — ...	1148
no ceremonial impurity from family of birth ...	<i>ib.</i>
<i>Transfer of Offspring</i> .....	<i>ib.</i>
son goes with father into adoptive family .....	<i>ib.</i>
<i>Adoption by Male prospective</i> .....	1149

PAGE

- ADOPTION—by male does not affect bygone transactions ...641c, 1149  
 ————— affect a completed gift ..... *ib.*  
*Adoption by Widow retrospective.*  
 “operates retrospectively” how construed 366, 983,  
 990, 991, 994  
 ————— not retrospective amongst competing collaterals. 994  
 even when postponed by fraud ..... 996  
 son by ————— ranks as posthumous..... 1150  
 ————— by widow of the last male survivor of family ... 993  
 widow’s ownership ceases ..... 1149, 1150  
 her past transactions subject to rescission..... 1150  
 upheld when they were necessary or beneficial  
 1150, 1151  
 rights of action and vested interest arise at —  
 1150, 1152  
 but extend only to interests actually vested in  
 deceased adoptive father ..... 990, 991, 1152  
 not to a *rāj* re-granted to a widow..... 1152  
 nor to collateral succession taken before actual  
 ————— ..... 1176  
*Adoption final* ..... 1152  
 ————— cannot be set aside..... 365, 918a, 938, 1086, 1153  
 or renounced ..... 1153  
 boy duly adopted not to be abandoned or disin-  
 herited ..... 340, 584, 1095, 1096, 1106  
 rights may be renounced ..... 1173  
 or made subject to conditions by agreement ..... 1154  
 no return to family of birth ..... *ib.*  
*Connexion with Family of Birth—As to prohibited*  
*degrees*..... 1153  
 a male, though given in ————— cannot marry within  
 seven degrees in family of birth.....937, 1155  
*Conditions and terms annexed to Adoption* ..... 1155  
 not allowed to affect the status..... 1156  
 conditions accepted in ignorance not binding..... *ib.*  
 life interest retained by widow adopting under will 1157  
 ————— under agreement with natural father held rati-  
 fiable ..... *ib.*  
 contrary view of Śāstris ..... 1158  
 allowed by customary law ..... *ib.*  
 nature of adopted son’s interest under wills, &c.,  
 in favour of widow ..... *ib.*

	PAGE
ADOPTION— <i>Specific effects.—Relations to Family of Birth</i> .....	1159
natural must give up to adoptive parents .....	<i>ib.</i>
—— not subject to expenses of the boy's samskâras .....	1160
tonsure wrongly performed by natural father void .....	<i>ib.</i>
obsequies performed for natural father ineffectual .....	<i>ib.</i>
adopted son should not perform obsequies for natural mother.....	1161, 1166
no inheritance in family of birth .....	1161
except in default of other heirs.....	1162
no obligation to pay natural father's debts.....	<i>ib.</i>
the incapacity for marriage in family of birth continues .....	1163
—— of younger brother by birth disapproved.....	<i>ib.</i>
relatives by birth do not inherit from boy given in —— .....	1164
<i>Relations to Family of Adoption.</i>	
adopted son cannot marry within three degrees.	937, 1163
the adoptive father is entitled to custody of son. .	1164
who should reside with him .....	<i>ib.</i>
adopted son entitled to maintenance .....	1165
and his widow .....	<i>ib.</i>
his samskâras to be performed .....	<i>ib.</i>
objects of —— set forth .....	1165, 1166
relation to adoptive mother's ancestors .....	1166
succession to adoptive father's estate.....	1166, 1171
bound to maintain widow .....	1166, 1167
similar duty of daughter-in-law adopting .....	1167
rights of son arise forthwith on —— .....	<i>ib.</i>
the ordinary rights .....	1168
alienation by father restricted .....	<i>ib.</i>
except of self-acquired property .....	1168, 1172
different relations of father and son as to pro- perty in Bengal and Bombay.....	1168/
interdiction open to adopted son .....	1169
cases of an adopted son's rights .....	1170ss
rights vest in son adopted by daughter-in-law 1171, 1180, 1183	
not annulled by subsequent disposition .....	1171
or birth of daughter's son (Bengal) .....	<i>ib.</i>

	PAGE
<b>ADOPTION</b> —adopted son succeeds though separated .....	1172
——— takes by survivorship .....	<i>ib.</i>
disinherison of adopted son .....	1173
his renunciation and relinquishment of rights 938, 1173	
he is not thereby restored to his family of birth 938	
his widow entitled to maintenance .....	1174
son not prejudiced by widow's unauthorized	
alienation.....	367, 1176
may get such alienations rescinded .....	367, 1174ss
but not those properly made .....	1184, 1186
adopted son divests widow's estate .....	366, 367
——— cannot defeat or divest an estate ? .....	992
——— cannot divest inheritance vested in son's widow .	993
widow's right reduced to that of mother and	
guardian.....	1174c, 1179
except in cases of necessity ? .....	1177
adopted son heir in turn to adoptive mother's	
stridhana .....	513, 1175, 1180
alienation by widow after —— not ratifiable .....	1175
her religious gift invalid.....	1176
she may give her separate property.....	1177
sale for husband's debts good .....	<i>ib.</i>
—— under necessity valid ? .....	<i>ib.</i>
rights in case of successive ——s by mother 1177, 1178	
as to alienations between death of first adopted	
son and second —— .....	1178
adopted son representative for suits .....	1179
——— pending suit by widow .....	<i>ib.</i>
widow's right to maintenance against adopted son	1180
and to residence .....	<i>ib.</i>
adoptive mother succeeds to son .....	<i>ib.</i>
adopted son succeeds to step-mothers.....	1181, 1182
connexion in sacrifices.....	1181c
succession of adoptive step-mother.....	1181, 1182
importance of right to adopt as between co-	
widows .....	1182
adopted son liable for adoptive father and grand-	
father's debts .....	1183
and those properly incurred by widow.....	1184
he recovers debts in his own right .....	<i>ib.</i>
adopted son pronounced liable as such for mo-	
ther's debts ? .....	1185, 1186



	PAGE
ADOPTION—admissions by widow as manager as affecting	
adopted son .....	1186
widow bound to account to adopted son .....	1186
adoptive mother legal representative of adopted son .....	<i>ib.</i>
adopted son yields religious precedence to one by birth .....	<i>ib.</i>
marriage in adoptive family prohibited to three degrees .....	<i>ib.</i>
adopted son regarded as of the adoptive family for further —s .....	<i>ib.</i>
adopted son competing with son by birth takes one-fourth .....	365, 372, 373, 388, 773, 935, 1187
so in mother's property .....	1187
exceptions (especially amongst Śūdras) ...	1187c, 1188
son by birth takes vatan or impartible estate.....	1188
adopted son excludes an illegitimate as heir to mother .....	<i>ib.</i>
sister succeeds to adoptive brother .....	1189
<i>Collateral Succession through Adoptive Father</i> .....	<i>ib.</i>
adopted son shares sacra of the family .....	<i>ib.</i>
— unless adopted after partition 1189,	1190
partition excludes boy subsequently adopted.....	1009a
adopted son is a sapinda.....	1196
he takes his father's share in a partition ...	935c, 1190
or in a collateral succession .....	1195
replaces him in united family.....	1190
two cases <i>contra</i> .....	1191
adopted son may compound for his share .....	939
coparceners need not wait for an — .....	1191
adopted son takes collaterally only where succession opens after — .....	1193, 1195, 1196
he continues an estate but does not recover it once distributed ...	1195
adopted son of whole brother preferred to natural son of half-brother ...	1194
collateral inheritance by a group and subsequent — .....	1195c
collaterals inherit from adopted son.....	1196
adopted son may separate from adoptive father...	939
but does not thereby lose his rights of inheritance	939
adopted sons succeed <i>inter se</i> .....	1197

	PAGE
<b>ADOPTION</b> —adopted son succeeds to sister's adopted son .....	1197
<i>Collateral Succession through Adoptive Mother</i> .....	<i>ib.</i>
comparison of the Roman Law .....	1197d
cases discussed .....	1198
conclusion that the adopted son takes collaterally through adoptive mother like son by birth 938, 1200	
Manu gives heritage of maternal grandfather only to begotten son... ..	447
<i>Imperfect Adoption</i> .....	1200
comparison of the Roman Law.....	1204e
———s contrary to caste laws annulled by caste .....	1201
a small share given in such cases.....	<i>ib.</i>
rights in family of birth unaffected by invalid .....	1202
succession or participation to the exclusion of a person disqualified not divested by — .....	<i>ib.</i>
sons already adopted take subsistence .....	<i>ib.</i>
————— or replace the father	1202c
a vicarious — allowed by custom .....	1202
conditions of cancelling — .....	<i>ib.</i>
————— invalidity .....	1203
invalid — transmits no right... ..	1205
right of maintenance arises in case of severance from family of birth.....	1204
invalid — not set up by subsequent change in family .....	1206
mere ceremony cannot give validity to unlawful ——s .....	909, 1043, 1044
no — over the head of a man fully initiated even after his death .....	1207e
or by other substitute than a widow ? .....	1207
<i>Case of a Grantee</i> .....	1208
the sovereign's or superior's consent required under native system for succession to the tenure. ....	<i>ib.</i>
a confirmatory sanad relied on to be proved .....	<i>ib.</i>
<i>Effects of Adoption as Dvayamushdyana</i> .....	1209
the boy inherits from his natural father in default of other sons .....	<i>ib.</i>
<i>Other irregular Adoptions.</i>	
kṛitrima son inherits in both families.....	<i>ib.</i>
————— contracts no family relation with the adoptive father's or mother's cognates.....	1067

	PAGE
ADOPTION— <i>kṛitrīma</i> son adopted by one parent succeeds to that one only .....	1210
— does not affect a <i>Talabda Koli's</i> right of disposal .....	1210
— similar law in some other castes .....	1213
— the adopted son may be replaced where a begotten son could be disinherited.....	1211
— no succession as son of adopted daughter, she having brothers.....	<i>ib.</i>
— — or under a bought son .....	<i>ib.</i>
— plurality of adopters and adopted.....	<i>ib.</i>
— a <i>gosāvi's</i> pupil does not succeed to him as father .....	1212
— <i>quasi</i> — of son-in-law not recognized .....	<i>ib.</i>
— his rights under customary law.....	1212b
— foster-son not recognized by the <i>Śāstras</i> as a successor.....	1212, 1213
— but recognized by custom .....	1213
— — as successor in both families.....	<i>ib.</i>
— widely recognized by the castes in <i>Gujarāt</i> .....	1213c
— adoptions generally disallowed there .....	<i>ib.</i>
— <i>quasi</i> — by <i>Nāikins</i> ineffectual .....	1214
— — exception .....	1214b
VIII.— <i>Suits and Proceedings connected with Adoption.</i>	
— jurisdiction recognized by <i>Hindū</i> law.....	1215
— <i>In case of Non-Adoption.</i>	
— agreement to adopt binding .....	<i>ib.</i>
— no suit to compel a widow to adopt .....	1216
— bequest to specified person not defeated by non-.....	<i>ib.</i>
— direction to adopt not equivalent to bequest .....	<i>ib.</i>
— breach of a written agreement as to — does not avoid it .....	<i>ib.</i>
— <i>Position of Widow before Adoption.</i>	
— she may obtain a declaration of her heirship .....	1217
— authority to adopt no obstacle .....	<i>ib.</i>
— two widows authorized may divide the property .....	<i>ib.</i>
— a son adopted may dispute widow's prior transactions.....	<i>ib.</i>
— presumption in favour of them if approved by heirs .....	<i>ib.</i>
— declaration in favour of son still to be adopted cannot be made .....	1218

	PAGE
<b>ADOPTION</b> —widow is not a trustee for son to be adopted .....	1218
widow continuing suit after — may be re- garded as trustee .....	<i>ib.</i>
no forfeiture for attempted false — .....	<i>ib.</i>
alienation by widow before second, — not affected by it .....	<i>ib.</i>
<i>Suits to establish Adoption.</i>	
a claimant in Bengal must prove authority and actual — .....	<i>ib.</i>
must sue for property when it is sought.....	1219
but may sue for declaration for use before another authority .....	<i>ib.</i>
an adopted son discarded may sue to establish his right .....	<i>ib.</i>
second — under power invalidated by existence of widow of first adopted.....	<i>ib.</i>
authority where required must be strictly proved .....	1219, 1220
evidence of ceremonies .....	1221
facts deemed significant .....	1220
presumption .....	1220, 1221
registration of deeds of — recommended .....	1220
in a suit as adopted son a right as dvyāmushyā- yana not to be set up .....	1222
conditions of suit for declaration .....	<i>ib.</i>
institution fee .....	<i>ib.</i>
certificate of administration may be claimed to estate of one whose — is disputed.....	1223
certificate of guardianship does not give a right against a widow disputing the — .....	<i>ib.</i>
<i>Suits to set aside Adoption.</i>	
person interested may question an — .....	995
suit competent apart from claim to property.....	1223
but not to a stranger .....	1224
adopted must prove — .....	1223
estoppel against one who has admitted — by conduct.....	1223, 1224
grounds deemed insufficient for setting aside — .....	1224
————— for establishing it.....	1226
suit competent only to nearest heir unless this is impracticable .....	1225, 1226

<b>ADOPTION</b> —suit for possession as heir must not be changed into one for declaration against an ———	1226
objection of consent not obtained held too late when raised before Judicial Committee	<i>ib.</i>
objection not pressed below disallowed in second appeal	1228
admissions, as binding or not, discussed	1226a
acquiescence or consent through ignorance not binding	1227
nor if got by misrepresentation	1227, 1229
<i>Adoption an incidental question.</i>	
——— in fact presumed valid	1228
case of conveyance convertible into mortgage on ———	<i>ib.</i>
devise to adopted son as <i>persona designata</i> upheld though ——— invalid	1228, 1229
<i>Proceedings consequent on Adoption</i>	1229
under Act XXVII. of 1860	1229, 1232
gift to adopted son not affected by birth of sons	1229
settlement on widow with concurrence of adopted son upheld	<i>ib.</i>
son cannot demand a declaration of right to specified undivided share	1230
son adopted <i>pendente lite</i> to be made a party	<i>ib.</i>
representation acted on to be made good	<i>ib.</i>
attestation of a deed of ——— does not bind to a statement therein	1231
certificate of administration to estate of adopted child	<i>ib.</i>
adoptive mother preferred as guardian	<i>ib.</i>
certificate of guardianship when to be given to a widow	1021, 1022
widow cannot continue a suit against wish of adopted son after he has attained full age	1232
she is entitled to certificate of administration to deceased husband's estate as against an alleged adopted son	<i>ib.</i>
the questions of title and of adoption to be adjudicated	<i>ib.</i>
in case of application for certificate of administration resisted	<i>ib.</i>

	PAGE
<b>Adoption</b> —a contest between widow and adopted son as to validity of will should be the subject of a regular suit .....	1233
effect refused to permission to adopt during adopted son's life .....	<i>ib.</i>
bequest contingent on death of proposed adopted son unmarried invalid.....	<i>ib.</i>
grant of probate to alleged adopted son cannot be resisted by creditors of next heir .....	<i>ib.</i>
<i>Judgments and Evidence in previous cases</i> .....	1234
no process for establishing or avoiding — as to all the world .....	1234 <i>b</i>
judgment on — is not <i>in rem</i> .....	1234
decree not evidence in litigation with third parties. ....	<i>ib.</i>
nor binding between adopted and a different heir ....	<i>ib.</i>
not <i>res judicata</i> when parties changed .....	<i>ib.</i>
but between the same parties <i>res judicata</i> , though for a different portion of the property.....	<i>ib.</i>
different decision in case of other property.....	1235
—— denied in a summary inquiry may be asserted in a suit.....	<i>ib.</i>
deposition of plaintiff in suit against one adopted son not admissible in suit for a second ?.....	<i>ib.</i>
a certificate may be granted as guardian to a son whose father's — has been set aside.....	1236
<i>Limitation</i> .....	1100, 1236
to suit for declaration of adoption six years from act contradicting it .....	1236
—— for declaration against — six years from knowledge .....	<i>ib.</i>
limitation computed from death of widow who had adopted after her son's death ? .....	1236, 1237
acknowledgment by sister of deceased held not to bind her son .....	1236
limitation in a suit for a share by one as adopted son computed from knowledge of exclusion ...	1237
<b>ADULTEROUS MOTHER</b> —must be maintained .....	592
—— WIFE—must be maintained by husband .....	<i>ib.</i>
not by his brethren .....	<i>ib.</i>
—— to be kept apart .....	<i>ib.</i>
her husband inherits her earnings by adultery .....	516
<b>See</b> Unchastity; Maintenance; Wife.	

	PAGE
ADULTERY—an offence under the Indian Penal Code.....	593
— disqualifies a widow from succeeding .....	89, 154, 430, 449, 588—594
but — does not divest property already vested.....	591
— revokes wife's authority to deal with husband's property .....	92a
— amongst the lower classes punishable as involv- ing injury to caste rather than loss of chastity. ....	424
one begotten in — has no right of inheritance. ....	387, 424, 582a
but of maintenance only .....	582a
reason why — was denounced.....	585n
— entails only a penance when connexion was not with a man of a lower caste.....	424
— with a low-caste man punished with divorce .....	ib.
— atoned at husband's will.....	ib.
<i>See</i> Disqualification; Unchastity; Wife.	
ADVANCEMENT—no presumption of — from purchase by a Hin- dû father in son's name .....	602, 722
ĀDYAM—explanation of .....	323f, 371
ĀGARVĀLĪ CASTE .....	373
AGE—of Vijnāneśvara .....	15
— the Dharmaśāstras .....	31, 37
— of majority fixed at eighteen .....	948
this does not affect adoption .....	960g
— of competence for religious acts .....	1090c
child how designated at different times .....	ib.
<i>See</i> Adoption II, 905d, 929; III, 947, 960, 961, 973, 996; VIII, 1232.	
Boy.	
AGHRĪNĀ— <i>See</i> Adoption III. ....	949c
AGNĪHOTRA .....	817
AGREEMENT—private cannot alter the course of devolution 4, 156a, 177	
— not allowed to control customary law .....	90
— between adopted son and mother pronounced void .....	177f, 187d
— ————— how far valid. ....	1115, 1158
— to divide after a certain event does not sever in- terests.....	684
<i>See</i> Adoption. VI. 1086, 1090; VII. 1154, 1157; VIII. 1215, 1216	
Evidence of Partition; Distribution; Partition; Partnership.	

	PAGE
<b>ALIENATION</b> —power of — dependent on circumstances .....	170
— limited by Hindū Law .....	186
— by adoption.....	810 <i>b</i>
— ; its growth in Europe .....	808 <i>n</i>
— by absolute owner now unrestricted.....	81, 219
family estate once deemed inalienable .....	731 <i>d</i>
how the family estate became gradually alienable .....	<i>ib.</i>
— generally disapproved in ancient laws .....	783
— of sacred property usually disallowed .....	741
religious endowment alienable only to one in the line of succession .....	202, 785 <i>n</i>
otherwise indivisible and inalienable .....	785
exceptions .....	<i>ib.</i>
interest of a temple servant alienable .....	785 <i>n</i>
vatan property cannot leave the family .....	846
— of self-acquired property limited to surplus over family needs .....	648 <i>a</i> , 759, 1241, 1242
impartibility consistent with alienability .....	159, 398, 741 <i>d</i>
but checks incumbrance .....	162
inalienability a question of family custom .....	159
rāj not necessarily inalienable .....	741 <i>d</i>
widow's right to maintenance inalienable .....	762
<i>Alienation by Coparcener.</i>	
a coparcener may alienate for value his share without consent of others ... ..	605, 664, 748 <i>d</i>
— but not by gift .....	477, 609, 664, 705
or by devise .....	664, 705
except for pious purposes.....	664
he cannot dispose of joint property without consent of the others (Mitāksharā) .....	478, 510, 601 <i>a</i> , 603 <i>e</i> , 705
restrictions on — by caste custom .....	745 <i>d</i>
— made under necessity valid by custom.....	750 <i>b</i>
<i>Alienation by Father.</i>	
— of patrimony subject to control of descendants unseparated.....	210, 638 <i>a</i> , 648 <i>a</i> , 812, 813 <i>a</i> , 814 <i>a</i>
— without assent of heirs invalid by custom .....	293 <i>e</i> , 645 <i>g</i>
son may prevent improper — .....	194 <i>g</i> , 639
or annul it unless made before his birth or adoption .....	641 <i>c</i> , 803, 1149
care for child unborn .....	211 <i>k</i>



	PAGE
<b>ALIENATION</b> —of immoveable property, though self-acquired, said to be invalid ?.....	772, 812
father has full power over property self-acquired	772, 804
by will invalid against a united son .....	813d
subject to provision for family.....	797, 798, 1242
depriving a widow or family of subsistence invalid .....	214, 241
for purposes not immoral binding on son .....	358
immoral purpose affecting but a trivial portion does not invalidate it .....	8
<i>Alienation by Grandfather.</i>	
with son's assent not disputable by that son's son	803
<i>Alienation by Mahant.</i>	
fraudulent — set aside .....	188f
<i>See Trust</i> .....	<i>ib.</i>
<i>Alienation by Manager</i> .....	637e, 766
acquiesced in by co-parcener is binding on him...	750a
<i>Alienation by Mistress.</i>	
mistress not to alienate a house given to her by her patron .....	194e
<i>Alienation by Son.</i>	
requires father's consent.....	813
<i>Alienation by Uncle.</i>	
without assent of nephews.....	813a
<i>Alienation by Widow.</i>	
dependent by caste usage on non-existence of male relatives of her husband .....	782d
not to prejudice subsequently adopted son.....	1174as
<i>See Widow.</i>	
Pilgrimage .....	322
<i>Alienation by Wife.</i>	
in case of paraphernalia under English law .....	186d
<i>See Ownership; Manager; Property Self-acquired.</i>	
Adoption VII. 1168, 1175, 1176, 1178, 1184, 1186; VIII. 1218.	
<b>ALAMANNI</b> —laws of the .....	884a
<b>ALLOWANCES</b> —temple, are hereditary and divisible .....	742
Chirdê.....	452
Desâigiri.....	<i>ib.</i>
Muglai .....	<i>ib.</i>
Sirpâva .....	<i>ib.</i>
Vazîfa.....	<i>ib.</i>

	PAGE
ALLOWANCES—from Government, arrears of are Stridhana.....	524
ALYA SANTĀNA LAW—See Adoption III. 1016, IV. 1068.	
ANALOGY OF HINDŪ LAW followed in succession to principalities, &c. ....	737
—— a means of construction.....	108
See Interpretation.	
ANANTADEVA—author of <i>Saṃskāra-kauṣṭubha</i> .....	24
ANCESTOR-WORSHIP.....	281
See Śrāddhas.	
ANCESTRAL LANDS = lands once held by common ancestor .....	713a
ANCESTRAL PROPERTY—See Property Ancestral : Succession ; Par- tition ; Alienation.	
ANIMAL SACRIFICE—formerly prevalent .....	900f
ANITYA ADOPTION—See Adoption .....	894g, 1143, 1205
ANITYA DATTA .....	899b
who is — son ?.....	105d
son of — son .....	1060d
ANNUITY—See Investment ; Nibandha ; Property.	
ANOMALOUS ADOPTION—See Adoption.	
ANVĀDHEYA—is a gift subsequent to marriage .....	146, 290, 519
—— is a kind of stridhana .....	518, 519
—— is shared by sons and unmarried daughters equally .....	146, 325, 519b
ĀPĀRIBHĀSHIKA STRIDHANA.....	518, 530
ĀPARĀDITTĀDEVA—is another name for <i>Āparārka</i> .....	18
ĀPARĀRKA—the author of <i>Yājñavalkyadharmasāstranibandha</i> ...	ib.
——'s doctrine as to Stridhana .....	18, 780
ĀPĀSTAMBA SŪTRA .....	34
ĀPĀSTAMBA OR ĀPĀSTAMBHA—school of .....	38
APOSTASY—(mere) does not free from the Hindū marriage-law .	597a
APPANAGE—of juniors in case of primogeniture .....	263
when it reverts.....	264
—— in India and Germany.....	737c
See Maintenance ; Zamindāri 743.	
APPEAL—suspends effect of decree for partition .....	663, 684
APPOINTMENT—of daughter, place of — in Hindū law.....	885
daughter by — is ranked third amongst subsi- diary sons by <i>Vasishṭha</i> .....	888
no longer recognized .....	886
not recognized by <i>Āpastamba</i> .....	889
nor by <i>Gautama</i> .....	ib.
nor by <i>Baudhāyana</i> .....	890

	PAGE
APPOINTMENT—of daughter conceived in two ways .....	888
traces of — in the existing law .....	886
relative position of — and her son .....	890
analogue amongst the Greeks .....	<i>ib.</i>
See Adoption—Pûtrika-Putra.	
APRATIBANDHA DĀYA .....	67
See Inheritance Unobstructed.	
APSARASES .....	884c
ARROGATION,—origin of the term.....	925c, 928a
—— Roman, limited to those who had attained years	
of discretion .....	893a
age of the adopter in an — of one <i>sui juris</i> .....	930g
safeguards for sons taken in — .....	916
—— of women not allowed before Justinian's legislation	933a
ĀRSHA .....	275, 514, 517, 519
See Marriage.	
ARYAN HINDŪS.—See Hindūs, Aryan.	
ASAGOTRA SAPINDA.—See Bandhus ; Bhinnagotra Sapindas ;	
Adoption IV. 976.	
ASAHĀYA .....	49
ASCETICS—orders of — .....	15, 17
—— succession to, based on personal association .....	555d
relations between — and their disciples gov-	
erned by custom .....	933
—— cannot alter succession to an endowment .....	555d
—— cannot impose restrictions on successors contra-	
ry to custom .....	<i>ib.</i>
See Mahant ; Adoption III. 940 ; VI. 1143.	
ASCETICISM.—See Adoption III. ....	950
ĀSRAMAS .....	64
ASSENT—of sons deemed necessary to alienation by father. See	
Alienation .....	645g, 648a
—— signified by attestation .....	638a
—— as once in Europe .....	192c, 223
—— requisite to a gift .....	191j
—— of members of family is necessary to expensive	
sacrifices, performed by one of them	603e
—— to gifts at mother's obsequies.....	<i>ib.</i>
—— not necessary to resigning holding by Govern-	
ment occupant .....	<i>ib.</i>
—— of brethren to adoption essential on account of	
widow's dependence.....	971f, 975, 995, 1010d

<b>ASSENT</b> —of brethren ought not to be refused except for special cause.....	975c, 980, 1002—1005
by ——— property dedicated to service of family idol may be disposed of .....	784e
but not that dedicated to public temple .....	ib.
coparcener, desiring to limit his responsibility for liabilities [maintenances of relatives, &c.] may secure himself by ——— of interested parties .....	788, 789
———— of co-sharers to charges binds them.....	750
———— to adoption implied from non-prohibition 970c, 971f, 972	
<i>See Acquiescence ; Adoption, passim.</i>	
<b>ASSESSMENT</b> — <i>See</i> Adoption III. ....	956
<b>ASSETS</b> —taken are accompanied by liability for debts of one deceased .....	165, 169, 649b
the responsibility of a son is not by Hindû Law dependent on ——— .....	166, 1240
but so limited by statute.....	80f 748
<i>See Debt ; Father ; Inheritance.</i>	
<b>ASSIGNMENT</b> —none of a right to maintenance. 192, 253, 259, 262, 302	
———— of debts to a parcener on partition .....	787
———— possible, of part-ownership in a physically indivisible property .....	832
———— of obligations .....	746a
<b>ASSOCIATION</b> —capable of creating a law for itself ? .....	597
<i>See Custom.</i>	
<b>ASTROLOGER</b> .....	180
———— 's relation to those who take his services governed by custom .....	410, 411
<i>See Joshi.</i>	
<b>ÂSURA MARRIAGE</b> — <i>See</i> Marriage.	
<b>ÂSVALÂYANA DHARMAŚÂSTRAS</b> .....	51
<b>ATHENIAN LAW</b> —compared with Hindû Law .....	176b, 585a
<b>ATHENS</b> — <i>See</i> Attica ; Adoption II. ....	916c, 938e
<b>ATTACHMENT</b> —of property for debts discussed.....	161
———— and sale of family land unknown to Hindû Law Books .....	649
———— not properly directed against undivided share ?	621a
———— of whole undivided property may be made for debt of one coparcener .....	663f
subject to rights of sons, &c.....	664

<b>ATTACHMENT</b> —of undivided share creates a charge on undivided interest .....	605e, 607
effect of — of impartible zamindāri .....	161
whether purchaser in execution of manager's share can be ousted ? .....	606e
<b>ATTACHMENT BY GOVERNMENT</b> .....	839
<b>ATTESTATION</b> —under Hindū Law intended to be of the transaction. <i>See Assent</i> .....	223
—— is a mark of assent .....	638a, 733, 778, 848
according to decisions — does not bind to contents .....	1231
—— in case of wills .....	222s
<i>See Wills.</i>	
<b>ATTICA</b> —laws of — against alienation and sub-division.....	214
—— — compared with Hindū Law .....	214, 283, 418
<b>ATTORNMENT</b> —equivalent to possession .....	696
<b>AUNT (paternal)</b> —not a gotraja sapinda even in Gujarāt .....	131b
but is entitled to rank as a bandhu.....	131b, 489
when — succeeds .....	484
<i>See Sapinda</i>	
(paternal) —'s son is a bandhu.....	133, 488, 492
—— case of exclusion of — by sister's son .....	495
—— is excluded by great grandson of fifth ancestor of the deceased.....	487
(maternal) —'s son is a bandhu.....	133, 488, 492
—— excluded by sister's son .....	495
<b>AURASA SON</b> — <i>See Son</i> .....	892
<b>AUSTERITIES</b> —may replace adoption .....	873, 1148, 1207
<b>AUTHENTICATION</b> —public—of transactions .....	1101
records originally recollections .....	ib.
<i>See Adoption VI. 1142.</i>	
<b>AUTHORITIES</b> —on Hindū law in Western India enumerated .....	9
( <i>See separate list, pp. lxxix—lxxxvi.</i> )	
their relative weight considered .....	12ss
—— supplementary .....	11
order of — .....	10, 11
<b>AWARD</b> , stranger to an—cannot rely on admissions in it .....	189c
<b>BĀLAMBHATTA</b> .....	17
<i>See Adoption V. 1071.</i>	
<b>BĀLAMBHATTAṬĪKA</b> —written by Lakshmidēvi .....	17
—— otherwise called Lakshmi Vyākhyāna.....	ib.
—— is a commentary on the Mitāksharā.....	ib.

	PAGE
<b>BALAMBHATTATIKA</b> —gives the widest interpretation to the text of Yājñavalkya .....	17
<b>BĀNDHAVAS</b> —include maternal uncle .....	135
<b>BANDHUS</b> —Vijñāneśvara's conception of — .....	134, 472, 489
——— defined.....	134, 488, 489, 496
——— how far — extend.....	490b
——— enumeration of — .....	133, 488
——— the enumeration of — is not exhaustive	134, 136, 489
——— limit of bandhu relation .....	488, 494
——— origin of this .....	488
——— includes all relatives within the degrees expressed	489, 490, 492
<i>See Sapinda.</i>	
——— among unenumerated —, nearer succeed before	
——— remote .....	491
——— mentioned in Law Books.....	492
——— not mentioned in Law Books, males.....	493
——— females .....	497
——— order of succession ...	134, 341, 487, 491, 492, 494, 495
——— Sapindas and Samānodakas are preferred to —	133, 489
——— postponed to Gotraja Sapindas.....	491b
——— in Bengal, — succeed before remoter Sapindas	115b, 487f
——— aunt's sons preferred in N. W. Provinces to	
——— cousin's widow ? .....	485
<b>BANTS</b> — <i>See Tribes</i> .....	285n
<b>BANYA</b> .....	412
<b>BARRENNESS</b> —not an impediment to inheritance in Bombay....	506
<b>BASTARDS</b> —inherited under Irish and Welsh law.....	82b
<i>See Illegitimate.</i>	
<b>BAUDHĀYANA</b> —on female inheritance .....	126ss
<i>See List of Hindū Authorities.</i>	
<b>BENĀMI SYSTEM</b> —may be traced to union of Hindū family .....	602n
——— transaction, presumption in a .....	722b
——— principle of .....	ib.
——— purchase in son's name .....	722
<b>BENEFITS</b> —spiritual. <i>See Adoption IV. 1035, 1066 ; VI. 1117</i>	
<b>BEQUEST</b> —of property acquired by partition good against remote	
——— heirs .....	139
——— of undivided share invalid.....	632, 664
——— merely for Dharma ineffectual .....	229

	PAGE
BEQUEST—tying up the corpus is invalid .....	230
——— by a coparcener singly is inoperative .....	603
——— by husband to wife treated as a gift.....	312f
——— to one son to the prejudice of others invalid. 208, 209,	771, 808
See Gift 603; Devise; Will; Testamentary Power; Perpetuity; Wife; Widow; Adoption VIII. 1216, 1233.	
BERAÐA CASTE .....	428
BETROTHAL AND MARRIAGE—sometimes confounded .....	277
BHĀCHĀ = nephew through a sister on one side.....	546
BHĀGADĀRI LANDS—male preferred to female in succession	
to — — — .....	431
in — — holdings, sub-division is prohibited .....	745
and also separation of the house from the holding	ib.
sale of part of a bhāg is void though made by a Court.*	
BHĀGĀDĀRI VATAN .....	463b
BHAGAVANTA BHĀSKARA—consists of twelve divisions.....	19
enumeration of these.....	ib.
BHANGA SĀLI CASTE.....	429
BHĀRADVĀJA SMṚITI .....	52
BHĀRTHĪ SECT .....	565
BHATELE CASTE .....	868, 952
BHAṬṬ VAIRĀGI—a mere grihastha.....	572
BHAṬṬ VṚITTI .....	730c
BHĀVIN = a votary of Rāwalnātha .....	527b
BHĪLS—See Tribes .....	289
BHOOTEAH—See Tribes .....	ib.
BHINNAGOTRA SAPINÐA—daughters of descendant and collaterals	
within six degrees are —s .....	137
descendants of daughters are —s .....	137, 491b
maternal relations within four degrees are —s	137
sister's son is a — .....	490
grand-daughter's grandson is a — .....	137
but her great-grandson is not a — .....	ib.
—s extend to mother's great-grandfather and	
his fifth descendant .....	490
not so in Madras .....	491b
seventh descendant through daughter is a —	
according to one opinion.....	ib.

\* *Collector of Broach v. Rājārām Laldās*, I. L. R. 7 Bom. 542,

- BHINNAGOTRA SAPIṆḌAS**—admission of more than one female link  
in connexion giving heritable right questionable 492*n*  
succession of —s ..... 490*ss*  
— — — — — daughter's husband's — to Stri-  
dhana of his wife ..... 537—540
- BHRĀTARAḤ** ..... 130*c*
- BIRTH**—actual — necessary to the full constitution of right  
as son ..... 67, 641*c*; 803  
— at once confers on the son the right to participate in  
property ..... 722, 803, 813  
*See* Adoption VII. 1159, 1163, 1171, 1186, 1187, 1188, 1200,  
1202, 1204; VIII, 1229
- Son.
- BLIND**; **BLINDNESS**—who is blind ? ..... 576  
blindness does not prevent disposal of property 577  
— — — — — disqualifies for inheritance ..... 153, 575—578  
if congenital ..... 155  
not partial ..... 578  
— — — — — disqualifies for taking under partition ..... 822  
— — — — — persons married and having families inherit in  
some castes ..... 165  
sons of — persons are not excluded ..... 576  
— — — — — disqualifies a widow ..... *ib.*  
— — — — — men must be maintained ..... *ib.*  
— — — — — of the son born does not justify adoption ..... 908  
*See* Adoption III. 950 ; Disqualification 576 ; Maintenance.
- BLOOD-RELATIONSHIP**—recognized amongst the lower castes ..... 929*e*  
— — — — — gives a right to inherit ..... 58  
— — — — — not jurally extinguished by adoption. *See* Adop-  
tion VII. .... 1162
- BOOK**—land in England originally pious grants ..... 192*c*
- BOOKS**—when indivisible and when not ..... 730, 735  
— to be kept by coparceners having them ..... 785
- BOROUGH**—English ..... 355
- BOY**—a — may not recite Vedic formulas except for obsequies 1241  
*See* Age.
- BRĀHMA MARRIAGE**—*see* Marriage. .... 514, 517, 519, 527
- BRĀHMACHĀRYA**—divided into Upakūrvāṇa and Naishṭhika ..... 59, 64  
meaning of Upakūrvāṇa and Naishṭhika — 500*a*, 500*b*  
succession to Upakūrvāṇa — ..... 58, 77, 500  
— — — — — Naishṭhika — ..... 144
- See* Adoption III. 943*c*.



	PAGE
BRĀHMIN COMMUNITY—when — inherits .....	138
BRĀHMAṆA—.....	64, 462
is born under three obligations.....	872
he only is born under three obligations .....	919
—s may become Sannyāsīs .....	552
— Nāgar.—See Adoption III.....	970
— widow.—See Adoption IV. ....	1033, 1062, 1064, 1065
—s have a spiritual title to all things .....	138a
succession of learned —s on failure of blood relations to the property of a — .....	136, 138
See Śrōtriya.	
this succession of —s not recognized by English Courts .....	138
See Adoption III. 962, 998; VI. 1084, 1120, 1131, 1135c, 1142	
BRETHREN—agrat to united—constitutes a Hindū joint tenancy	76
BRIDE-CAPTURE—see Capture .....	882
BRIDE-PRICE .....	273, 278
discussed .....	376
common amongst the wild tribes.....	282
and low castes .....	376
institution of — existed among Hindūs for a time among all classes.....	274
— came to be looked on with abhorrence by the Brāhmanical community in later times .....	275
— became peculiar to Vaiśyas and Śūdras .....	ib.
though in the Ārsha form of marriage gift of bull or cow was still preserved .....	ib.
practice extending in Sub-Himālayan districts ...	282
sales still not unusual in Gujarāt.....	ib.
Śulka and — .....	276—279
— amongst the Jews .....	277b
— — Germans.....	ib.
connexion with <i>dos legitima</i> and <i>morgengabe</i> ...	277, 278
Roman <i>co-emptio</i> .....	277
— in China.....	278
Strīdhana had a pre-historic origin in the — ...	273
— goes to the mother or the brother.....	275, 277
— — father in the Huzāra district.....	275d
See Śulka; Strīdhana.	
BRIDE-PURCHASE—see Bride-price .....	274
BRIHASPATI SMṚITI .....	47
its age.....	48

	PAGE
BṚHAT ŚAUNAKA .....	51
BROTHERS—are the coparceners specified by Mit. and May.....	72, 73
—— include more remote relations according to the opinions of the Śāstris .....	73, 74
sons of the same concubine are ranked as full—	83, 383
succession of —— 110, 341, 400, 428, 436, 453, 460, 467, 531	
under Mit. full and half —— rank equally in undivided families .....	76
but in divided families full —— are preferred to half —— .....	849
in Bengal full —— take before half —— in undi- vided families, and undivided or reunited half —— take equally with separated full —— ...	75, 457
when —— and nephews succeed simultaneously 75,	108, 111
—— exclude foster-daughter .....	454
reunited half —— take equally with separated full —— .....	141
reunited full —— exclude reunited half —— .....	142
half——acquire the right of inheritance by reunion 75	
succession of —— of half-blood ...112, 352, 404, 435, 455, 457, 458, 467	
according to Mit. and Vyav. May .....	112
half —— postponed to full sister by Vyav. May.	458
—— succession of, to full sister .....	465, 468
separated —— postponed to father ... ..	454
by birth take precedence of one previously adopted	935g
half —— postponed to full sister .....	112
divided —— preferred to first cousin's widow... 455	
—— sister's son .....	547
succession of —— to unmarried females .....145, 501	
—— —— to Stridhana of females mar- ried by approved rites .....	542, 544
—— —— by blamed rites...	521, 527
take Śulka Stridhana .....	277, 279, 280, 327, 519d
succession of half —— to Stridhana of married females .....	545
succession of illegitimate —— to legitimate ...	383
whether illegitimate and legitimate half —— form a united family .....	ib.
partition between ————— .....	815—822

	PAGE
BROTHERS—may demand partition at any time .....	650
———— take equal shares on partition .....	363, 778, 816
and divide debts equally .....	362, 787
elder — takes management with consent of others .....	284b, 609
younger — not to precede the elder in marriage	914e
elder — enjoyed a superior position in ancient times .....	281c
ancient authority of — in disposing of sisters...	280
a — may interdict dealings with heritage by another to the prejudice of his right .....	293e
initiatory and marriage expenses of unmarried — a charge on joint estate .....	782c, 816, 820
————'s share is liable for sister's marriage if her share is insufficient.....	782c
elder — takes right side of house by custom...	823
———— western ————— ...	ib.
————'s power to mortgage joint property .....	821
widow of the last deceased — takes the property	345
See Adoption V. 1073, 1079, 1080, 1081; VII. 1189, 1194; Nephew; Primogeniture; Renunciation.	
BROTHER-IN-LAW—succeeds to a widow .....	525
———— is preferred to the widow's brother .....	527
BROTHER'S DAUGHTERS—are bandhus .....	497
———— to be married at the expense of the family estate	822
succession of — — .....	497
———— take equally .....	459
———— preferred to brother's daughter's son .....	497
———— postponed to first cousin once removed .....	ib.
BROTHER'S DAUGHTER'S GRANDSON .....	ib.
———— SON—excluded and admitted in Bengal	ib.
BROTHER'S GRANDSON—preferred to daughter's grandson .....	480
BROTHER'S SON—can be adopted.....	1037
succession of — .....	112
————s succeed <i>per capita</i> .....	459
———— —————s to an interest vested in his father before his death .....	109
———— excluded by brothers .....	ib.
————s (unseparated) exclude widow .....	459a
———— of the whole and half blood .....	455, 459
———— (half) succession of .....	112

	PAGE
<b>BROTHER'S SON—</b>	
<i>See</i> Adoption IV. ....	1018, 1024, 1025, 1033
Nephew. ....	
<b>BROTHER'S WIFE</b> .....	481
<b>BURDEN OF PROOF:—</b>	
acquisition since partition to be proved by party asserting it .....	688
after partition — lies on party questioning it, to show that particular parts of the property were not included.....	703a
separate acquisition to be proved by party asserting it .....	728
sons, seeking cancellation of sale by father, to prove that the charge was one they, were not answerable for .....	748
incumbrancers to show good reasons for holding son's property liable to pay off father's debts	648a, 749
incumbrancer to scrutinize a transaction by widow	101, 102g
gross inequality of partition by father between sons to be proved by party asserting it .....	809
— of indivision on plaintiff when he has had separate possession of part for 16 years .....	695
<i>See</i> Escheat .....	139
<b>BURGUNDIAN LAW</b> —compared with Hindû Law .....	88a
<b>BURUDA</b> — <i>See</i> under Caste.....	399
<b>CACHÂRIS</b> — <i>See</i> Tribes .....	281
<b>CANON-LAW</b> —compared with Hindû Law .....	243n
<b>CAPTURE IN MARRIAGE</b> .....	280f
once common.....	882b
still observed in form by some tribes .....	280, 423
— of the bridegroom amongst the Gâroos .....	288n
<b>CARMINA</b> —metrical form of early laws .....	56n
<b>CASTE</b> —its influence on the descent of property .....	64
was thought of much more than chastity in early times .....	424, 884c
except Brâhmanas, all placed on the same ceremonial level.....	1135c
expression of will of — .....	555, 599
law of — subordinated to general Hindû Law...	90
— decisions subject to the King's courts.....	599n

	PAGE
<b>CASTES</b> —questions excluded from the cognizance of civil courts.	599a
— incidentally cognizable.....	599
— temple .....	554
expulsion from — extinguished share in property by disabling for religious rites	587, 588, 590, 752a
but was not a ground for retraction .....	588, 590
exclusion from — a bar to adoption .....	956
loss of — is now not a disqualification warranting the adoption of a substitute P.....	907
— does not affect inheritance...426, 575a, 658	
comparison of Roman Law as to heretics .....	576a
non-forfeiture of rights by loss of — .....	590
exclusion from — not a cause of forfeiture in Khandesh.....	1173a
two degrees of loss of — recognized by the Viramitrodaya .....	58a
restoration to — by means of penance .....	58a, 590
<b>CASTES AND CLASSES</b> .....	661—662, 1213a
Agarvâli .....	373
Bant̃s (Canara) .....	285a
Berada .....	428
Bhanga Sâlf .....	429
Bhârthi.....	565
Bhâta .....	394
Bhâvin .....	527b
Buruda .....	399
Châmbhâr or Châmbâr.....	810
Chârana .....	394
Chetti .....	1067
Dorik.....	589
Durgee Meerâsee Soorti .....	424b
Gavall .....	407
Giri .....	565
Goojar Talabda .....	257a
Gosâvi .....	552, 566
Gujâr.....	476
Gurava .....	494a
Jains... 157, 568, 901h, 923a, 1050e; see Adoption III.	952, 953; IV. 1038
Jangams (Lingayat priests).....	567
Jati .....	568

## CASTES AND CLASSES—

	PAGE
Jogtin .....	527
Kanoji .....	347
Kānpātā—Gosāvi .....	562
Khalpa Khumbatta .....	249, 257
Khatrī .....	582a, 1213
Kolambi .....	394
Koli .....	374
Koombhāra .....	249, 257
Kunabi .....	356, 360, 416, 427, 502, 516, 532, 565, 844
Lingāyat .....	359, 416, 509, 1079
Lohār Sootar .....	257a
Lohār Surati .....	ib.
Machee Gudrya .....	249a
Māhār .....	356, 371, 442
Māli .....	379, 380, 526
— (Moghrelia) .....	550a
Māli .....	571
Mānabbāū .....	570, 571
Marāṭhā .....	513, 526
Mārwaḍī .....	377, 456, 462
Mochi .....	257a
Muralī .....	442, 502, 522, 527b
Naigama .....	553
Nānakshāhi .....	570
Paradeśī Sutar .....	257a, 378b, 454, 542, 586, 811
Parit .....	449
Pāshāndas .....	553, 568
Prabhu or Parbhu .....	521, 952c, 1029
Purī .....	565
Rajput .....	384, 458
Rāmavat .....	574
Rangārī .....	359
Salvees .....	751d
Simpī (Tailor) .....	516, 1136
Sonār .....	505
Sonis .....	751d
Śrāvāk .....	568, 569
Sutār .....	257a
Tapodhana .....	434
Taulkiya Audichya .....	ib.
Vaghree .....	249a
Vairāgi .....	572, 573, 574, 575, 588

CASTES AND CLASSES —	PAGE
Vandī .....	394
Vānī .....	411, 508, 523
Yatī .....	59, 144, 568, 569
Yogī .....	798
See Adoption, <i>passim</i> ; Tribes.	
Custom .....	550ss
CASTE CONNEXION—See Adoption III. ....	950, 951, 956
CASTE PROPERTY—jurisdiction declined in suits relating to— ?	599
CAUSE OF ACTION—usually exhausted by a suit.....	629b
but not so in particular cases .....	<i>ib.</i>
comparison of the English, Hindū, and Roman Law. ....	<i>ib.</i>
CELTIC LAW—compared with Hindū Law.....	82
CEREMONIAL—See Adoption V.....	1072
— gift .....	1073
CEREMONIAL SERVICES—son owes — to his father, mother, and step-mother .....	1069
CEREMONIES—questions on — .....	11
— essential. See Adoption VI. ....	1084, 1085
no particular — essential to complete adoption. ....	922
no initiatory — for Śūdras except marriage .....	1064, 1089
vicarious celebration in the case of Śūdras and women .....	920
joint performance of — implies union of in- terests .....	852b
separate performance of — not conclusive of partition .....	689
a stranger not to perform religious — .....	185
See Adoption, <i>passim</i> .	
Sacra.	
CHÂLŪKYA DYNASTY.....	16, 17
CHÂMBHĀR OR CHÂMBĀR CASTE .....	810
CHANCE—See Gains .....	724
CHĀRAṆA—(Juggler) .....	394
CHĀRAṆAS—(the Schools).....	32, 33, 54
the origin of intellectual life.....	32
CHARGE ON LAND—sense of.....	773, 774
CHARGE—ON inheritance .....	160ss
enumeration of —s.....	746, 747
— created by decree and attachment of undivided share .....	632, 707—708
a joint trade loan is a — on joint family property. ....	340
— for payment of debts of the deceased owner .....	160

## CHARGES—on inheritance—

PAGE

- non-liability of property in hands of *bond fide*  
 purchaser ..... 77, 746a, 789b  
 promises made by the father..... 161  
 debts by father, contracted not for immoral or  
 illegal purposes are — though not incurred  
 for benefit of family ... 76, 77, 162, 164, 168, 717,  
 747, 788, 800, 813  
 so are father's directions as to charities ..... 747a  
 husband's just debts are — ..... 315  
 separate debts of deceased co-parcener are not  
 charges on undivided property ..... 76, 787, 790  
 maintenance of those entitled thereto ranks as  
 — ..... 747  
 as *ex. gr.* the maintenance of a widow ..... 163  
 and ——— concubine and her children 164  
 marriage expenses of unmarried brothers and sis-  
 ters are — ..... 781, 816, 820  
 what —s may be on the manager's share ..... 763n  
 — incurred by the manager when binding ..... 749  
 — enforceable against holder of part of the property. 791  
 CHARITABLE Uses—purposes beneficial to the public..... 200  
 — enumerated ..... 207n  
 — moulded to modern needs ..... 207n, 230a  
 superstitious — not disallowed ..... 215d  
 CHARITY-IES—common — enumerated ..... 206  
 — cy près doctrine admitted by Hindū Law ..... 230  
 dying directions as to — must be fulfilled ..... 747a  
 See Alienation; Dharma; Endowment; Gift; Will 226.  
 CHASTITY—less regarded than caste in early times ... 424, 884n, 885n  
 CHATTEL—See Son ..... 931, 1075  
 CHELI—purchase of — recognized in some cases ..... 559  
 — not regarded as adoption ..... *ib.*  
 — must be nominated by his guru and confirmed by  
 mahants ..... 556  
 — bound to maintain his guru in distress ..... 793f  
 —'s succession to guru ..... 554  
 succession of a — among Śrāvaks..... 556  
 —s joint succession of two ..... *ib.*  
 See Disciple.  
 CHIEFSHIP—succession to — see Principality; Rāj.  
 CHINA—See Adoption ..... 100, 899e  
 CHINESE LAWS AND CUSTOMS—compared with Hindū..... 271f



	PAGE
CHIRPĒ RIGHTS— <i>see</i> Allowances .....	452
CHRISTIANS—native, not free to adhere to Hindū law since the passing of Indian Succession Act .....	4
CHŪPĀ ceremony, to be performed in adoptive father's family. 1060 <i>See</i> Adoption IV. 1083.	
CHŪPĀKARANA = tonsure .....	1056b, 1060c
<i>See</i> Adoption 1063; Chūḍā.	
CHUNDAVAND .....	422
<i>See</i> Patnibhāg.	
CIVIL DEATH—of a person results from his entering religious order .....	58
——— from a woman's being expelled from caste by Ghaṭasphota .....	ib.
but since Act XXI. of 1850, by loss of caste a person does not lose his civil rights .....	658
CLOTHES IN USE—to be kept by those having use of them ...785, 831 ——— when indivisible, and when not .....	730, 734
——— how divided .....	785
COCHIN— <i>see</i> Polyandry .....	284
COGNATES— <i>see</i> Bandhus; Bhinnagotra-Sapindas; Adoption, IV. 1067	
COLLATERALS—in partition take <i>per stirpes</i> .....	778
subject to allowance for prior partial partition... <i>ib.</i> <i>See</i> Adoption III. 994; Bandhus.	
COLLATERAL SUCCESSION— <i>see</i> Succession.	
COLLUSION BY CO-SHARER— <i>see</i> Fraud .....	611a
CO-MEMBERSHIP OF COMMUNITY—gives right to inherit .....	58
COMMENSALITY—cesser of — is evidence of partition .....	689, 826
in case of — property presumed to be joint until contrary shown .....	720
COMMENTATORS—Hindū .....	14a
——— use other Smritis to supplement the one commented .....	55
COMMENTARIES—Sanskrit .....	17
COMMON PROPERTY—classified .....	709
COMMON STOCK— <i>see</i> Property.	
COMPENSATION—for land withdrawn from general partition .....	779
——— in case of partition of interests, without one <i>in specie</i> .....	778
——— when one divided coparcener loses his share through the wrong of another ..	837
COMMUNITY—change of — frees from the operation of the cus- tomary law of inheritance .....	3
——— 's right of ownership still asserted .....	172c

	PAGE
<b>COMPOUND</b> —is divisible under ordinary circumstances .....	832
<b>CONCEALMENT</b> — <i>see</i> Repartition.	
<b>CONCUBINAGE</b> —allowed amongst Gosâvis by custom .....	553
— in low castes not disgraceful .....	425
<b>CONCUBINE</b> —regarded as a dâsi or slave .....	86, 384
pât-wife having first husband alive is a — .....	415
remarried widow was regarded as a — before	
Act XV. of 1856 .....	413
keeping a low-caste — entails penance only ..	424
— can take bequests .....	377
— entitled to maintenance... 80, 164, 194, 385, 461, 532,	593, 653 <i>d</i>
investment may be made for her maintenance ...	415
— must be provided with maintenance before she	
is deprived of property in her possession .....	755
— of the late owner entitled to maintenance from	
heir .....	415
<i>See</i> Saranjâm.	
sons of a — are regarded as brothers of the	
whole blood <i>inter se</i> .....	83, 383
<i>See</i> Illegitimate son.	
daughter of a — entitled to a provision .....	164
<b>CONDITIONS</b> —in some cases not allowed .....	187 <i>d</i>
— running with land .....	189
— cannot be annexed to status of son or to mar-	
riage. 187 <i>d</i> , 1085	
— subsequent void if repugnant .....	187
— in cases of adoption .....	1155
<i>See</i> Gift, 186, 187, 441; Grant, 188; Adoption, VI, VII.	
<b>CONFIRMATION</b> —of adoption by the sovereign deemed impor-	
tant .....	1011 <i>a</i>
<b>CONSANGUINITY</b> —the foundation of the right of succession ...	62, 752
duty of sacrifice annexed to — .....	752 <i>a</i>
<i>See</i> Adoption, IV. 1036.	
<b>CONSENT</b> — <i>See</i> Assent; Adoption, IV. 1067; V. 1071, 1075, 1076;	
VI. 1121; VII. 1203; VIII. 1226, 1227	
<b>CONSTITUTUM POSSESSORIUM</b> .....	218 <i>c</i>
<b>CONSTRUCTION OF GRANTS</b> .....	397, 463
<i>See</i> Interpretation	
<b>CONSTRUCTION OF LAWS</b> — <i>See</i> Interpretation.	
<b>CONTINGENCY</b> — <i>See</i> Gift, 217; Condition.	
<b>CONTINGENT REMAINDER</b> — <i>See</i> Remainder.	

	PAGE
CONTRACT—Hindū law superseded by Statute .....	7
— between Hindūs and other classes.....	6
— law of defendant applicable to —s.....	ib.
—s of the father pass to the heir .....	80
— of betrothal not to be specifically enforced .....	1090
— for gain by giving in adoption illegal .....	1087
COOKING—separate — evidence of partition .....	852
Co-OWNERSHIP .....	189
COPARCENER—who are —s .....	73, 74
—who are not —s .....	436
—males only can be —s. ....	653
—'s possession is <i>prima facie</i> possession of all —s .....	633c
—ship continues though some members separate ...	666
—difference between joint tenant and — .....	601n
—purchaser of undivided share becomes tenant in common with other —s. ....	606
— <i>Powers of Coparceners</i> .....	607
—in case of urgent need may dispose of joint pro- perty .....	632, 821
—may dispose of undivided share for value but not by way of gift or devise... ..	605, 631, 664
—consent of all —s requisite to any gift (Panjāb)... ..	821d
— <i>See</i> Alienation; Representation.	
— in Bengal incapable of dealing with his share down to Deendial's case .....	624
— may redeem from mortgage and claim contri- bution.....	790
— separated —s must contribute in case of share taken to satisfy a common liability .....	839
— not entitled to redeem his share alone.....	790
— undivided —s may take separate interests ...	194
— and though divided may take jointly .....	ib.
—a — cannot by giving costly ornaments to his wife deprive the others of their share in his acquisitions .....	208, 294
— may resign his share for a trifle .....	659, 827, 838
— cannot be compelled to assent to an adoption by a widow.....	864, 881, 904
— not generally entitled to an account from an- other — .....	765n
— no ownership of any definite share is predicable of a particular — while united .....	686

	PAGE
COPARCENER—notice of enhancement of rent by some —s held	
sufficient in Bengal .....	608 <sub>n</sub>
comparison of English Law .....	<i>ib.</i>
adult — bound by the transactions of manager	
when he takes the benefit .....	617
a — cannot singly oust a family tenant or	
enhance rent.....	607
in Bombay a person holding with the assent of	
one — regarded as if put in possession by him.	608 <sub>n</sub>
some —s only not allowed to take advantage	
of a condition of re-entry .....	<i>ib.</i>
<i>Partition between Coparceners</i> .....	815—829
each —'s whole property supposed to belong to	
common stock .....	708
a — may demand partition at any time .....	665
——s' prior agreements <i>inter se</i> bind in partition ...	836, 838
——s in existence only entitled to a share on partition.	792
a — is not liable at partition to make up what he	
has expended in excess of his own share .....	765
except in cases of dishonest waste .....	835
a — takes on partition what he has expended in	
excess of his own share of debts .....	362
absence of some —s does not bar partition.	676, 816
after-born —s share only their father's share.	792
fraud does not disqualify a — from receiving a	
share at partition .....	679, 680, 835
but the fraudulent — may be made to restore	
property sought to be withheld.....	679, 680, 765, 769, 835
purchaser of undivided share has to work out his	
right by partition .....	606
<i>Succession to Coparceners</i> .....	65, 73, 141, 339—354
a — dying without issue his share goes to his	
undivided —s .....	346
<i>Suits by and against Coparceners.</i>	
all —s must join as plaintiffs in a suit on a joint	
claim .....	615
except when one sues in a representative capacity	<i>ib.</i>
a — cannot alone sue to set aside a charge	
created by another .....	608
some only allowed to eject an intruder contrary to	
wish of another.....	608 <sub>n</sub>

- COPARCEENER**—**a** — cannot recover his fractional share in joint property from stranger..... 607, 608  
**a** — is liable after partition for shares of debts. 789  
 — **s** are not generally entitled to account from manager for transactions prior to demand ..... 836  
 payment to one of several — **s** frees the tenant.  
 — **s** not answerable for separate debts ..... 632  
 unless incurred for family necessity..... *ib.*  
*Suits by and against Coparcener.*  
 — **s** who have colluded with a tenant to defraud a co-sharer may be sued by him in common with the tenant ..... 611  
 creditor of one — may attach undivided property ..... 706  
*See Mortgage* ..... 821  
**COPARCENER REUNITED** ..... 58, 61, 63, 140, 342  
 — **s** — of equal degree share equally ..... 141  
 succession to — ..... 141, 142  
*See Family, Joint; Interdiction* 707c.  
**COSHARER**—*See Coparcener.*  
 Property..... 1242  
**COURT OF WARDS**—*see Adoption III.*..... 955  
**COURTYARD**—division of **a** — refused ..... 830  
**COURTS, HINDŪ**..... 239  
**COURTESANS**—ornaments of — exempted from seizure ..... 885a  
 — ranked as members of a business association..... *ib.*  
*See Adoption III.* 1016.  
**COUSIN**—used in a general sense for collateral ..... 483  
 united — inherits in preference to the widow... 351  
 first — ..... 136  
*See Adoption IV.* 1024, 1035.  
 second — excludes a third ..... 477  
 — of five removes inherits ..... 437  
 distant — if united preferred to widow and daughter-in-law..... 589  
 husband's — excludes husband's sister's son 530, 531  
 separated first — postponed to united half-brother ..... 352  
 — though separated is preferred to illegitimate son. 474  
 (= nephew) — sister-in-law. 483  
 maternal aunt's son postponed to samānodaka ... 487  
 — succeeding to a female (Śūdra) ..... 546

	PAGE
COUSIN—female — See Adoption IV. ....	1034
— first —'s son an heir .....	491b
See Adoption IV. 1026.	
COUSIN'S DAUGHTER'S SON—See Adoption IV.....	1029
COUSIN'S SON—preferred to sister's son .....	349
See Brother's Grandson.	
COUSIN'S WIDOW.. .....	485
her succession.....	485, 486
See Stridhana.	
COUSIN'S WIFE—See, Widow of Cousin.	
COVERTURE—See Husband; Wife; Females; Stridhana; Adop- tion V.....	1072
CO-WIDOW—See Adoption VII. ....	1182
CO-WIFE—son of — as heir—see Adoption III. ....	522
CREDITOR—when bound to inquiry .....	101d, 166, 169, 749
when a minor's interests are touched — must prove good faith.....	749
— of the father must establish his claim.....	640c, 1241
a joint — cannot sue alone, but can give an effectual discharge .....	610c
— of an undivided coparcener may enforce partition 625, 663, 706, 748, 790	
—'s assent should be obtained by parcener on parti- tion to secure himself against further claims.....	788
in partition enforced by — share of wife must be provided for.....	757
—'s fraudulent transactions may be rescinded by a coparcener .....	750
See Adoption VIII. 1233; Debt; Minor; Partition.	
CUSTOM; CUSTOMARY LAW—	
<i>Its Origin</i> .....	597
— regarded as based on lost Smṛitis.....	551
— the basis of Hindû Law* .....	1
duty of conquerors to maintain — .....	2
— to be upheld by the king .....	553
— cannot be made by one family .....	743
but upheld when found .....	ib.
— ascertained from practice and opinions of the more intelligent .....	869

\* On the recognition of custom as a source of law by the Hindû authorities, see R. S. V. N. Mandlik's Vyav. Mayûkha, Introd. p. xliv. ss.



## CUSTOM; CUSTOMARY LAW—

local — of male in preference to female inheritance in Gujarât.....	156
— enlarging widow's power of disposal (Dekhan, Gujarât).....	782 <i>d</i>
— in Gujarât generally rejects adoption .....	1213
— admits fosterage but sparingly .....	<i>ib.</i>
— allows marriage with maternal uncle's daughter in the Dekhan .....	868
of cousins in the South .....	<i>ib.</i>
family — binding .....	69 <i>b</i> , 597
— — when texts uncertain .....	69
— governs intermarriages .....	156 <i>a</i>
— held to govern the validity of an adoption. .	741 <i>b</i>
— may make an estate inalienable ..	159
— binds the holder of a rāj .....	156, 157, 737
instance of this .....	156 <i>a</i>
rāj regranted after 20 years governed by former law of succession.....	158
when an estate is by family — impartible the ordinary law is so far only superseded.....	<i>ib.</i>
family — excluding partition .....	735, 744 <i>b</i>
— pronounced a question of fact.*	
<i>In case of Sacred property.</i>	
— governs succession to temple emoluments, &c.	156, 177
<i>See below.</i>	
<i>Effect of</i> — its relation to the general law— <i>see</i> above.....	90, 155
— has the force of law .....	867, 868, 870 <i>n</i>
— may preserve or alter the law of the family ...	550, 551
— as a means of interpretation .....	550
— controls the received construction of texts ...	199 <i>b</i> , 869
— replaces the Veda, when the precept of the latter is not decisive .....	867, 869
construction of documents showing family—...	743 <i>b</i>
— governs marriage relations .....	90, 156 <i>a</i>
— — and the parties, ceremonies, &c., in adoption.....	1042, 1060, 1067, 1125

\**Burjore Bhavāni Pershād v. Muset Bhagana*, Pr. Co. 23 Nov. 1883. The family custom was of a *patnibhāg*, of exclusion of daughters, and of limitation of a widow's adoption to sons of near *sapindas* of the husband.





	PAGE
DANCING WOMEN—association of — not foreign to Hindû system .....	886n
adoption by — — .....	1068
See Courtesans 885n.	
Adoption II, 933n; III. 1016, 1016n, 1068.	
DAIVA—See Marriage.....	514, 517, 519
DÂS—See Adoption II.....	922, 936
Marriage.....	86
DÂSÎ .....	383, 516
connexion with — innocent according to Nârada .....	885n
See Concubine.	
DÂSÎ-PUTRA—See Illegitimate Son.	
DASNÂMÂH elects a successor .....	556
DATTA HOMA—See Adoption.....	934; VI. 1082, 1084, 1125, 1126
DATTAKA SON—See Adopted Son.	
alone now recognized as substitute for a son.....	894
See Adoption IV.; V. 1071.	
DATTAKA CHANDRIKÂ—an authority in Western India .....	9, 23
its weight as authority .....	11
See Adoption 1078.	
DATTAKA KAUSTUBHA—See Adoption V. ....	1076
and separate List of Hindû Authorities.	
DATTAKA MIMÂMSÂ—an authority in Western India.....	9, 23
its weight as authority .....	11
See Adoption IV. 1070, 1072, 1074; VI. 1134b;	
and separate List of Hindû Authorities.	
DATTRIMA—meaning of.....	1078
DAUGHTER—	
Her Status.	
her position generally inferior to widow's accord-	
ing to Privy Council .....	105
contra in Bombay .....	105, 106
position of — in undivided family is the same	
as that of sister.....	351
— by marriage passes into husband's family .....	129
hence does not share father's exclusion from caste	130
— not named as representative of collateral line by	
Vyav. Mayûkha.....	470
Her Relation to Father and his Estate.	
— inherits from her father.....	104, 270
—'s claim to inherit inferior to adopted son's.....	1063

	PAGE
DAUGHTER—succession to her separated father's property. 88, 104, 341, 429ss, 456, 460, 466, 467, 502, 531, 591	
origin of the right of succession of — ..... 105, 420	
it is still postponed to that of male collaterals in some castes ..... 745d	
gradual recognition of — as heir ..... 890	
—'s portion..... 754d	
—s of the same condition inherit equally..... 105, 443	
—s cannot inherit in an undivided family 349, 350, 352, 438	
— inherits in a divided family ..... 104, 430	
— excluded in some Narvadâri villages ..... 430	
— succeeds on failure of widow ... 269	
— preferred as heir to a daughter-in-law... 128a, 433, 436	
— to step-mother ..... 433	
— to separated brother..... 435	
brothers exclude foster —s ..... 454	
— excluded by brethren in some castes ..... 745d, 792e	
— is excluded by brother and nephew of deceased in undivided family ..... 501a	
—s married preferred according to their indigence 145, 443	
—s unmarried preferred to married. 104, 105, 145, 325, 326, 442, 508	
reason of this..... 105	
—s unendowed preferred to endowed 145, 325, 442, 443, 508	
— unmarried in undivided family takes a quarter share ..... 350	
—s excluded at first as unmarried succeed in pre- ference to their sister's heirs (Bengal and Madras) ..... 335c	
in Bengal a married — having or likely to have a son succeeds ..... 506	
childless widow excluded in Bengal..... 443	
her right not extinguished by her becoming such. <i>ib.</i>	
Bengal law compared with that of Bombay ..... <i>ib.</i>	
barrenness of a — not a cause of exclusion ... 107	
— and illegitimate son of a Śūdra take equally... 105, 503	
unchaste — does not succeed to her parents according to Macnaghten ..... 154c	
step — inherits..... 536	
<i>Estate taken by Daughter.</i>	
— in the Panjâb generally transmits no right..... 430	

	PAGE
DAUGHTER—in the Panjāb usually excluded .....	430
lands not given to —s by the Rājputs beyond a life-interest.....	316 <sub>f</sub>
growth of father's power to provide for — out of tribal lands and to take her husband into the family .....	430
— takes limited interest in property inherited from father in Bengal.....	431
in Madras and Bengal her estate assimilated to that of widow .....	151, 431
Maithila law .....	332
but in Bombay a — takes it as Strīdhana ...	431, 432
—s take separately, excluding survivorship.....	106
two or more —s divide.....	442
this view is held by Vyav. Mayūkha .....	109
in Madras —s take as a class with survivorship	108
— takes in Bombay an absolute estate transmissi- ble to her own heirs... 106, 108, 309, 327,	431
— not a mere life-tenancy .....	106
different view of the Privy Council .....	432
—s are entitled to shares in a partition according to the Vīramitrodaya .....	303
—'s share being one-fourth of a son's .....	678
— takes property on partition as Strīdhana .....	270, 298
— entitled to maintenance and residence.....	68
and marriage expenses .....	438, 501a, 754, 822
— of a deceased coparcener must be maintained... 232, 248, 753d	
— of a reunited coparcener must be provided for	144, 438
— of a predeceased son entitled to maintenance....	753
and a marriage portion .....	ib.
— of a concubine entitled to a provision .....	164
reasonable provision for — must be made good by son .....	208, 350
<i>Relation to Mother and her Estate.</i>	
—'s succession to her mother 145, 151, 266, 310, 326, 327, 502, 510	
— preferred to son in succession to mother.....	549
— daughter's son.....	504
— daughter-in-law .....	482
— takes mother's property after payment of her debts .....	467, 503

DAUGHTER—unmarried —s share equally with sons Anvādheya and Pritidatta Stridhana.....	146, 268, 519c
unmarried —s alone succeed to Yautaka Stridhana .....	325, 327, 519c
has full power over Stridhana devolved from her mother .....	303
<i>Succession to her.</i>	
in Bengal on the death of — property goes to her father's heirs .....	431
she cannot alienate it to their detriment.....	<i>ib.</i>
devolution of property taken by —s .....	332, 335c, 336, 444, 445
<i>As to Adoption.</i>	
———— not to be adopted.....	873, 932, 933
existence of — no bar to adoption .....	978, 996, 1194
<i>See Adoption 943, 970, 1107, 1114; Sister's Daughter; Sister; Brother.</i>	
DAUGHTER, ILLEGITIMATE—cannot inherit.....	432
whether — — of a Śūdra can inherit is a question .....	<i>ib.</i>
is entitled to maintenance and marriage expenses .....	432
DAUGHTER'S DAUGHTER—	
———— —s receive a trifle when there are daughters .	151
———— —s receive a trifle in Anvādheya and Pritidatta Stridhana at division .....	146
———— — not an heir to a male .....	477
her right admitted by Bālabhaṭṭa.....	130c
succession of — — to Stridhana .....	151
———— next to daughter in succession to grandmother.....	510
DAUGHTER'S GRANDSON—inherits to a woman .....	537
———— — postponed to brother's grandson .....	480
DAUGHTER'S HUSBAND— <i>See Adoption IV.</i> .....	1035
DAUGHTER'S SON—of an ascendant an heir in Bengal.....	493
———— —s take <i>per capita</i> .....	109, 445
———— — precedes grandson's widow .....	445
———— — excluded by a great-grandson in the male line .....	390
———— — and illegitimate son of a Śūdra take equally .....	107
———— — inherits separate property of a united coparcener .....	107

	PAGE
DAUGHTER'S SON—inherits to a separate grihastha .....	107, 153, 433
————— takes as full owner.....	445
————— inherits to a married female.....	152
————— s preferred to son's sons.....	511
————— excluded by a daughter.....	152, 433, 445
when ——— shares the inheritance	
with his aunt .....	433
step ——— inherits .....	536
Śūdras may adopt ——— .....	1037
Lingāyats may adopt ——— .....	ib.
See Adoption 886, 887, 942, 1029, 1030, 1035, 1066, 1067, 1171	
DAUGHTER-IN-LAW—may take gift or legacy from her father-in-	
law if not prejudicial to others' rights .....	295
succession of ——— .....	481, 482, 528
Bālabhāṭṭa and the Viramitrodaya on ———'s	
right to inherit .....	529
————— preferred to mother-in-law as heir to her deces-	
ed husband.....	408
————— to son's daughter .....	528
————— to first cousin's widow.....	482
————— excludes distant cousins.....	ib.
————— is excluded by brother .....	432, 454, 482
————— brother's son .....	459, 482
————— daughter .....	433, 482
————— daughter's son .....	445
————— entitled to maintenance ...	246, 247, 251, 756, 760d, 761
—————'s claim on father-in-law as such denied .....	758c
does ——— forfeit her right to maintenance by	
residing with her father P.....	757, 758
————— has a better claim than her father-in-law to adopt	
to her husband .....	372
See Adoption III.	
————— has a better claim than her mother-in-law.....	405
See Adoption III.; VII, 1171, 1180, 1183; Widow.	
DAUHITRA .....	87, 130c
DĀYA—compared with inheritance.....	57, 67, 238, 600, 678, 711
participation by birth is the typical form of ———	238
widow has independent power over ——— .....	302
DĀYA APRATIBANDHA—See Apratibandha Dāya.	
DĀYABHĀGA—See Dāyavibhāga.	
DĀYĀDA .....	135
DĀYAVIBHĀGA—defined .....	57

	PAGE
DĀYAVIBHĀGA—includes rules for the division of an estate .....	57
——— of Jīmūta Vāhana, <i>see</i> separate List of Hindū Authorities.	
DEAF; DEAFNESS—disqualifies for inheritance .....	153, 576
<i>See</i> Adoption III, 950.	
Disqualification 576.	
DEATH— <i>See</i> Civil Death; Presumption.	
DEBT—	
<i>Joint Family's.</i>	
——— contracted by the manager <i>bond fide</i> presumed to be for the common benefit .....	749
and binding on other members.....	750
——— a first charge on joint estate .....	751
——— incurred by a member under pressure of distress is binding on all .....	632, 750
family —s to be discharged (but this not indispensable) before partition .....	787
———s of a joint business must be paid before profits are distributed .....	<i>ib.</i>
———s how distributed on partition.....	786ss
when —s are distributed creditors' assent should be obtained .....	788
<i>Separate—</i>	
personal — of a deceased member not a charge on the joint estate.....	161
and even though for family, if no necessity .....	<i>ib.</i>
<i>Father's and Grandfather's—</i>	
son bound to pay father's and grand-father's —s 80, 161, 164, 166, 586, 609, 642, 746b, 747, 1240 not during their life.....	643ss, 799
the Hindū Law insists strongly on payment of father's —s .....	613
son's liability according to Yājñavalkya and the Mitāksharā .....	1239ss
obligation to pay father's —s a part of the inheritance .....	163, 167, 169
estate taken by son is assets for paying father's —s .....	606s
obligation to pay father's —s depends on their nature .....	77, 164, 193
son liable to pay independently of assets?.....	1183
liability to pay father's —s limited to those incurred for the family? .....	747, 748

**DEBT—Joint Family's.**

impartible estate liable to pay father's —s .....	163c
ancestral estate in the hands of a son liable for father's —s .....	81, 167, 194, 643
translation of this into power of the father to encumber in his life .....	614
a son must pay father's —s even in his life?	618, 625
hence a sale of family property to pay these binds son .....	622
liability to pay father's —s after his death and in his life distinct .....	746b
son's liability to pay father's —s incurred be- fore partition .....	789b
son liable by custom for all —s properly incurred for family .....	800
father's —s not prodigally contracted may be charged on the inheritance .....	166, 169, 193
comparison of English Law .....	620c
several sons liable according to their shares	788c, 1241
separated sons not liable for father's —s ...	166, 789
property not hypothecated to pay father's —s 77, 161, 194, 746b	
community of obligation amongst successors not recognized by Hindû Law except in joint family	611
unsecured —s not a charge on the estate	193, 194, 746
son not directly responsible for unsecured —s	164
except after father's death.....	164, 625
securities created by father unless profligate bind sons.....	77, 164, 614
responsibility of son according to Hindû Law arises only at his majority .....	620, 625, 1240
minor bound to discharge on attaining majority .	1241
decree-holder for father's —s preferred to one for owner's — s .....	750a
<b>Son's —</b>	
father not to pay son's —s .....	586
— must pay —s necessarily incurred by sons living with him .....	800
<b>Husband's —</b>	
widow bound to discharge husband's —s .....	102
not if barred by limitation .....	ib.



## DEBT—

PAGE

- Coparcener's* ———  
 undivided property not answerable for separate  
 ———'s ——— ..... 76, 161, 787, 790
- of a member to the common estate set off though  
 barred by limitation..... 751
- apportionment of ———s amongst sons and succe-  
 sors ..... 611, 768
- Annexed to Estate taken.*
- obligation to pay ———s dependent on taking pro-  
 perty ..... 80f, 160
- is limited by Bombay Act VII. of 1866,  
 80f, 165, 748, 787
- income liable to pay ———s if property descends as  
 hereditary ..... 161, 167
- brother answerable for brother's ———s only to  
 extent of assets..... 725b
- See Adoption VII, 1162, 1177, 1183, 1184, 1185, 1186;  
 Charge; Coparcener; Decree 628; Dāya; Family Par-  
 tition 786; Obligation.*
- DEBTOR—one of several joint——s may represent all in paying,  
 but not in resisting payment ..... 610-
- agriculturist under Native Governments ..... 786
- DECISIONS OF COURTS—weight to be given to..... 871
- DECREE—may award arrears and future payments..... 262, 757a
- awarding separate interests destroys joint estate 683,  
 684, 842
- comparison of English Law ..... 684d
- right to partition under—— lost by non-execution 663c
- effect suspended by appeal ..... 606c, 694
- for partition of land paying revenue to be exe-  
 cuted by the Collector..... 794
- for maintenance a charge on estate ..... 757a
- against a member of joint family as affecting  
 other members ..... 619ss, 626b
- against representative member on a joint debt  
 may be executed against the family property... 616
- law as laid down in N. W. Provinces ..... 617
- in Madras ..... 628
- against manager only, binds only his share ..... 636
- against a father a charge on property..... 748
- not to be satisfied out of his  
 share at his death? ..... 628
- Judicial Committee's decision *contra* ..... 169, 628

	PAGE
<b>DECREE</b> —effect of the execution of a — for father's debts	
against ancestral property .....	167
— against a widow for arrears as a charge; only	
her estate passes .....	636e
— against the widow; when it binds the reversioner.	96a
<i>See</i> Adoption VIII. ....	1234
<b>DEDICATION</b> —understood in grants to Brāhmanas .....	138a
— to religious uses .....	160
— to religion inalienable under most systems of law	
186n, 557	
— the first exception to inalienability of patrimony	
192a, 197	
— connected with the growth of individual owner-	
ship over wastes.....	197a
— to an idol creates a trust.....	160
<i>See</i> Endowment .....	557
<b>DEDUCTION</b> —in partition in favour of eldest son.....	805, 807
— disallowed .....	806
<i>See</i> Partition; Distribution.	
<b>DEED</b> —of partition not essential to partition.....	681a, 848
— constitutes separation .....	841
— required by some castes .....	681a
— held inoperative as not acted on (Madras)... <i>ib.</i>	
<i>See</i> Registration.	
— of adoption not necessary— <i>See</i> Adoption VI. 1087,	
1119, 1122	
<b>DEFECT</b> —of son warranting adoption— <i>see</i> Adoption III. ....	908
— of organ— <i>see</i> Disqualification .....	576
<b>DEFENDANT</b> —law of — when it prevails .....	5, 6, 7
<b>DEGREES</b> —of affinity obstructing marriage .....	937, 1027
— prohibited extend to great-grandson of one given	
in adoption .....	937a
— under the Canon Law .....	243
<i>See</i> Adoption II. 937, 938; IV. 1022, 1027, 1062n; VII. 1153,	
1155; VIII.	
<b>DELEGATION</b> —by husband.— <i>see</i> Adoption III. 957, 958, 1069,	
1070; VI. 1120	
<b>DEMANDANT</b> —partition confined to the —.....	665
<b>DERANGEMENT</b> —presumed from prodigal alienations .....	207
<i>See</i> Lunatic; Adoption III.	
<b>DESAI, DESAIGIRI</b> — <i>see</i> Vatan; Allowances .....	452
<b>DESCENDANT</b> —what —s form a united family .....	651

	PAGE
DESCENDANT—which —s take the inheritance by representa- tion .....	65
such —s extend to third generation .....	652
rights on partition between the ancestor and his first three —s .....	770, 771
first three —s of a separated person take <i>per</i> <i>stirpes</i> .....	78
————s of an absentee may claim down to the seventh degree .....	677
DESCENT—law of — is not regarded as inherent in land .....	744b
law of — is determined by personal status .. 4, 744b	
or by family custom .....	4, 156, 735
Zamindâri or Vatan aliened or divided is freed from special rule of — .....	744b
comparison of English law .....	<i>ib.</i>
<i>See Devolution; Vatan.</i>	
DESGAT VATAN— <i>see</i> Vatan.	
DEVASTHÂN—does not revert .....	741d
<i>See Dedication 174c; Grant; Endowment, Religious.</i>	
DEVISE—is on the same footing as a gift <i>inter vivos</i> .....	293
———— merely for “Dharma” ineffectual .....	229
executory — (remote) not recognized by Hindû Law .....	97, 179, 184
———— not to be regulated by English Law .....	98a
———— to several sons with cross remainders is good under Hindû Law .....	<i>ib.</i>
———— of inâm village to widows against son .....	806
———— alienating ancestral property void against a son unseparated .....	813d
———— to a <i>persona designata</i> as adopted son effectuated .....	1228
———— of land once inoperative in England without assent of heir .....	219a
<i>See Adoption VI. 1108; VIII. 1228, 1229; Bequest; Will 806, 813</i>	
DEVOLUTION—course of — cannot be altered by private agreement .....	4, 156a, 177, 585
———— prescribed by law .....	178, 184a, 585
———— of jâgirs and other public grants governed by the intent of sovereign .....	179
<i>See Vatan.</i>	
DHARMA—the rule of law .....	240
what it comprises .....	32
a devise merely to — ineffectual .....	229

DHARMA—engagements against ruler's — do not give a right to enforcement .....	188
<i>See</i> Devise.	
DHARMA-PATNI—alone inherits .....	88
who is a — .....	<i>ib.</i>
DHARMA-PUTRA .....	891c, 1160, 1213
DHARMAŚĀSTRAS .....	31
their divisions .....	32
— of Uśanas .....	36
— of Śaṅkha .....	40
— of Manu and Yājñavalkya .....	43, 45
— Āśvalāyana .....	51
DHARMASINDHU—an authority in Western India .....	10
—'s weight as authority .....	11
— compiled by Kaśinātha .....	25
DHARMASŪTRA— .....	32
Gautama .....	34
Vasishṭha .....	<i>ib.</i>
materials of which —s are constructed .....	36
—s existed in the time of Patanjali .....	38
four of them composed in the South of India; the fifth probably in the North .....	39
DIKPRADARŚANA.....	108, 266a, 656
— = indication of a principle to be followed .....	74
DĪKSHĀ—meaning of .....	567a
— Jangama .....	<i>ib.</i>
— Triordha.....	568
DĪNĀRA.....	48, 49
DINING APART—a sign of partition.....	689
but — not conclusive of partition.....	<i>ib.</i>
DISCIPLE—natural son may become .....	559
ceremonies at the nomination of — .....	558
succession of — to Guru .....	499, 554
— who deserts his Guru forfeits succession .....	572
— takes equally with a united Gurubhāṇ .....	556
— succeeds to a Gosāvi .....	555
—'s disciple inherits .....	562
succession of female — to a Gosāvi .....	561
<i>See</i> Fellow-Disciple .....	562
DISEASE, INCURABLE—sufferers from — disqualified to inherit.	154
DISINHERITANCE—by father of son by birth or adoption for adequate reasons.....	585

	PAGE
DISINHERITANCE—of adopted only as of begotten son .....	1152, 1173
son disinherited may be restored.....	585
no — by will .....	587, 1113
comparison of Roman and Athenian Laws.....	585a
<i>See</i> Adoption III. 946; VII. 1173.	
DISOBEDIENCE—simple — does not disable the wife from inheriting .....	429
DISPOSITION—power of — limited by Hindū Law .....	196, 385
<i>See</i> Adoption VI. 1107, 1114; VII. 1171; Family; Father; Gift, Maintenance.	
DISQUALIFICATION—persons disqualified to inherit .....	153, 575a
— arising from :—	
insanity .....	153, 576, 580
subsequent insanity no — .....	580
incurable blindness .....	<i>ib.</i>
but only congenital .....	155
lameness.....	576, 578
leprosy of a virulent type .....	154, 561, 579
deafness and dumbness .....	153, 579, 580
enmity to father .....	583
addiction to vice .....	586
adultery and incontinence .....	588
— by loss of caste cured by penance.....	58a
loss of caste now no — .....	154b, 426, 575, 658, 907
son of disqualified father may take his father's place down to the partition of the inheritance .....	585, 908
disqualified father replaced only by begotten son (or Kshetraja), .....	577
not by one born or adopted after succession or partition .....	577, 580, 590, 752, 792, 950, 1191d
simple disobedience of wife no — .....	429
under the Mitāksharā and the Mayākha barrenness in a daughter no — .....	506
— to inherit from defect arising after inheritance or partition does not cause forfeiture.....	443
as <i>ex. gr.</i> in case of lunacy .....	580
the rule of exclusion qualified by custom.....	155, 752a
— for inheritance to be scrutinized by Courts.....	586
— for sharing under customary law .....	752a
— to inherit excludes from a share on partition.....	679
and from right to demand partition .....	<i>ib.</i>

	PAGE
DISQUALIFICATION—disqualified father not entitled to a share on partition .....	679, 822
disqualified persons entitled to maintenance 248,	751 <i>d</i> , 752
wife of a disqualified person may adopt.....	908, 948
——— by custom, not by the Śāstra.....	580, 581 <i>a</i>
See Adoption III. ....	946, 949, 950
DISTRESS—warrants alienation of common property by coparcener.....	632, 799
in — husband may deal with wife's Stridhana	92, 274, 297, 310 <i>n</i> , 318
season of — justifies gift of a son—see Adoption V.....	1074
See Coparcener 821 ; Debt, 632, 750.	
DISTRIBUTION—capricious or inhumane — of property not allowed .....	208, 209
——— of property naturally indivisible to be equitable..	734
——— of property amongst the Jews .....	808 <i>n</i>
unequal — when valid .....	771, 772, 811
——— subject to control by the Courts.....	809
——— not to be effected by will P.....	772 <i>a</i> , 813
——— allowed by custom .....	772 <i>c</i>
——— has regard to property as it actually subsists ...	763
——— by division of proceeds .....	694
——— of liabilities .....	746, 791
——— <i>in specie</i> when takes place .....	770
——— is equal on a partition of ancestral property between an ancestor and his descendants to three generations .....	<i>ib.</i>
——— on a partition between brothers .....	778
——— on a partition between reunited coparceners .....	783
on a partition between collaterals — is <i>per stirpes</i> .....	778
partial — on a former occasion how taken into account .....	698, 778
——— of rents and profits is not conclusive of partition.	786
——— of debts.....	786, 787, 788
——— by marshalling in favour of creditor in possession	633, 778
See Division ; Partition.	
DIVISION—none between husband and wife .....	91, 142
——— cannot be partial.....	661, 699, 785
except by consent.....	844

	PAGE
<b>DIVISION</b> —of a religious fund or dedication by turns of office and emoluments ..... 785 <sup>n</sup> patrimonial lands not divisible according to the Smṛitis; <i>see</i> Property, Sacred ..... 732 <sup>n</sup> —— may be made of upādhyapana by custom ..... 785 <sup>n</sup> —— not completed creates no separate interests ..... 686 —— unequal when good.....811, 839 —— of rents and profits a permissible partition ...694, 786 —— of income for convenience does not amount to a separation ..... 694 —— of the profits of a Vatandāri village..... 786 agreement to make a — does not sever interests 684 will Courts ever refuse to decree a — ? ..... 676 <i>See</i> Family; Partition; Separation.	
<b>DIVISION OF PROCEEDS</b> —a mode of joint enjoyment ..... 693 —— of partition..... 694	
<b>DIVORCE</b> —by Ghaṭasphoṭa .. ..... 588 —— by Śoḍa chīṭi..... 592 —— at husband's will ..... 424, 425 —— by agreement in some castes..... 423 —— seldom occurs ..... 425 —— allowed amongst the lower classes ..... 423 not in the higher ones ..... <i>ib.</i> —— disentitles a woman to maintenance..... 593 <sup>a</sup>	
<b>DOCUMENTS</b> — <i>see</i> Adoption III. .... 955	
<b>DONATIO MORTIS CAUSĀ</b> —recognized by Hindū Law .....219, 747 <sup>a</sup>	
<b>DORIK</b> — <i>see</i> under Castes ..... 589	
<b>DOS LEGITIMA</b> ..... 319	
<b>DOWER</b> (English law) ..... 319, 396 —— capable of release not of alienation ..... 302 <sup>a</sup> <i>See</i> Palla ..... 418 <sup>a</sup>	
<b>DRAUPADI</b> —legend of..... 281	
<b>DRAVIDA COUNTRY</b> — <i>see</i> Adoption II. .... 973, 974	
<b>DUHITRA-SUTA</b> ..... 84	
<b>DUMB, DUMBNESS</b> —congenital — disqualifies for inheritance 153, 155 —— of the son born does not justify adoption ..... 908 <i>See</i> Adoption III, 950; Disqualification 579.	
<b>DUPLAS</b> — <i>see</i> Tribes ..... 289	
<b>DUTY</b> —of a Hindū depends on his personal law ..... 7 —— indispensable; discharge of — a ground for alienation by single coparcener..... 750 <sup>b</sup>	

	PAGE
DVAITA NIRNAYA—is a work by Śankara.....	20
——— necessary to explain some parts of the Mayūkha. <i>ib.</i>	
DVYĀMUSHYĀYANA .....	896, 897, 914
——— of the original type not now recognized .....	897
——— in what sense now recognized .....	<i>ib.</i>
——— not unusual in the Southern Districts of Bombay	898
status of the son of — .....	899
——— celebrates the Śrāddhas of both fathers, but his son those of the grandfather by adoption only.....	<i>ib.</i>
form in adopting a — .....	1134
———'s right of inheritance .....	1208, 1209
——— not to be set up in a suit on ordinary adoption .	1222
See Adoption IV, 1041, 1044, 1066; V. 1078; VII. 1209; VIII, 1222	
DWELLING—see House.	
EARNINGS—are at the disposal of the woman according to Jīmūta Vāhana.....	301
——— of a woman belong to her husband .....	292
——— by prostitution belong to husband...	516
See Stridhana.	
EAST INDIA COMPANY'S power to legislate .....	1
EATING—separate — evidence of partition.....	852ss
ECCENTRICITY—implying injustice ascribed to derangement.....	196
EGYPT .....	100n
EJECTMENT—by wife against her husband .....	302a
ELDER BRANCH—succession of — — by custom .....	743, 744
ELDER; ELDERSHIP—advantage allowed to — by custom .....	784
——— gives precedence .....	728
and preference for office .....	745
precedence allowed by some family laws to son of elder wife .....	924a
——— gives title to the right or western side of family house in partition .....	823
——— gives a preference as to custody of family idols.....	784e
supremacy annexed to — connected with the sacra .....	728
the — brother has precedence in sacrifices and marriage .....	914e
——— still of consequence .....	736a
transition from — to single succession .....	728



	PAGE
<b>ELDER ; ELDERSHIP</b> —the mode of establishing — a source of disputes in India and Europe .....	736a
<i>See</i> Brother ; Manager ; Precedence ; Primogeniture ; Rāj.	
<b>ELECTION</b> .....	1229e
<b>EMANCIPATION</b> —under Roman Law son injured by adoption claimed — .....	1080f
<b>EMIGRANT HEIR</b> —descendants of — —.....	73
<i>See</i> Absentee.	
<b>EMIGRATION</b> —does not alter the law of inheritance.....	3
<b>ENDOWMENT</b> —creation of —s .....	201
interest of the State in religious —s .....	216
gift for religious — by coparcener approved ...	664
no restriction on creation of religious — by grant .....	185b
religious — not allowed to cover a private perpetuity .....	668
consent of whole family may annul a private religious — .....	817
charitable —s are inalienable 175, 201, 557, 785n, 818 and irresumable .....	202
—s never revert .....	741d
—s frequently confined to a single family .....	202
property given to a purohit is in the nature of an — .....	200
— usually impartible .....	202
but divisible by custom .....	730c
<i>See</i> Vṛitti.	
— may be temporarily pledged for necessary purposes .....	557
succession to an — determined by custom ...	201
holder of an — cannot impose rules on successors .....	202
or alter succession .....	78, 555d
succession to religious — is <i>per formam doni</i> . 201a	
<i>See</i> Alienation 785n ; Ascetics 555d ; Trust ; Trustee.	
<b>ENEMY OF HIS FATHER</b> —defined .....	583, 584
— is especially one from whom religious benefits are not obtainable .....	585, 587, 752a
— is disqualified from inheriting and sharing in partition .....	154, 584, 679, 752
<b>ENGAGEMENTS</b> —Hindū Law enforces .....	8
<b>ENGLISH LAW</b> —operation of — — in a presidency town.....	3

ENGLISH LAW—comparison of — — — with Hindû Law	60, 79, 88a, 96, 97, 98, 162, 182, 186d, 189, 192c, 213, 214, 215d, 216, 217, 218, 254n, 260, 284, 297, 298, 302a, 319a, 346, 355, 359, 377, 585d, 590, 601a, 607c, 610c, 613, 620c, 627, 629c 633, 648, 649, 670n, 671c, 675, 684d, 688, 695, 696, 697, 705c, 717, 725, 734, 735d, 744b, 773, 775n, 779, 794, 806a, 841, 846
EQUITY—aids Hindû Law .....	8
——— decides when Smṛitis conflict.....	11
——— rules of —— decide questions of partition .....	832
See Adoption; Hindû Law; Interpretation; Jurisdiction; Partition.	
ERROR—see Acquiescence; Adoption VIII. 1229; Ignorance 1228, 1229; Misrepresentation.	
ESCHEAT—State takes by —— on failure of heirs proved .....	130
——— and with incumbrances .....	722n
ESTATE—one cannot create a new form of — .....	178f, 193
——— solely <i>in futuro</i> not allowed by Hindû Law.....	217
——— not to be in abeyance .....	178
——— deferred in enjoyment .....	1159
——— right of father and son are equal in ancestral—	74
——— mortgaged property until recovered continues to be a joint — .....	684
——— family —— once inalienable, divisible only for use	731d
——— connexion with this of the right of pre-emption..	ib.
——— how the family —— became alienable.....	ib.
——— ————— and partible.....	ib.
——— ancestral —— in the hands of sons liable for father's debts.....	81, 163, 169
——— may be incumbered by any coparcener in an emergency .....	821
——— separate —— liable for debts in the hands of the heir .....	716
See Adoption VI. 1107, 1109, 1110, 1111, 1113, 1114; VII. 1188, 1195; VIII. 1231; Alienation; Debts; Descent; Devolution; Father; Grant 721b; Property; Stridhana; Vatan.	
ESTOPPEL—fed by subsequently acquired interest a doubtful principle under Hindû Law .....	190c
——— in case of adoption .....	1097ss, 1223
——— where adoption has been admitted by conduct	1223, 1224

	PAGE
ESTOPPEL—does not arise from denial of adoption .....	1235
— against reversioner who concurred in an aliena- tion by a widow.....	778a
— against a mortgagee who has sold .....	790
<i>See</i> Acquiescence; Adoption IV. 1065; VI. 1097; VIII. 1223, 1224	
ETHICS—relation of — to Hindû Law .....	8
EUNUCHS—entitled to maintenance only .....	753a
EVIDENCE—of caste custom.— <i>See</i> Custom.	
— of family custom by declaration. <i>See</i> Custom, Fa- mily.....	156a
<i>Of Partition</i> , not peculiar .....	681
conduct and oral testimony are — .....	681, 688
— is a question of intention .....	681, 682, 691a
signs according to the Hindû Law .....	687as
circumstantial — sufficient to prove parti- tion .....	690, 691a
— of separation is on a matter of fact .....	690
separate possession of portions of the property, once joint, raises a presumption of separation..	692
false statements made for the common benefit are not — of partition.....	693
exclusive possession for thirty years affords con- clusive — of partition.....	696
separation for fifty years was pronounced —	690d
taking profits in certain defined shares is not conclusive — .....	693, 694
living and dining apart is not conclusive —	689
separate performance of religious rites is not conclusive —.....	ib.
proof of instrument by single witness by assent .	223
admissions not to be used by strangers .....	189c
burden of proof in case of separate acquisition disputed.....	728as
— of adoption .....	1091, 1221
decree on a contested adoption is not — when there is a change of parties .....	1234
<i>See</i> Adoption VI. 1091; 1139, 1142; VIII. 1221, 1234; Burden of Proof; Presumption; Stranger.	
EXCLUSION—from caste .....	1066
— from caste extends to sons born after but not to those born before the expulsion .....	130, 585

	PAGE
EXCLUSION—sons born after expulsion from caste take the out-cast father's place.....	585
daughters are not excluded with their father.....	<i>ib.</i>
—— from inheritance and partition on account of vice.	752 <i>a</i>
under customary law .....	<i>ib.</i>
for twelve years extinguishes the right * .....	686
persons excluded from shares are entitled to maintenance. ....	248, 679, 751, 752, 776
See Disqualification ; Limitation ; Possession .....	704 <i>a</i>
EXECUTION—against one coparcener affects only his share .....	663 <i>f</i>
liability of the son's share in — against the father discussed.....	618 <i>ss</i>
a "reversioner's" contingent right cannot be sold in —.....	96
See Debt ; Decree ; Sale.	
EXECUTOR—under Act V. of 1881.....	225, 226 <i>a</i>
—— may pay a barred debt.....	613
—— in mofussil may sue without probate .....	226
—— s are the representatives of the testator .....	162
——'s legal position discussed .....	225
—— takes a qualified "universitas" in personal estate (English Law) .....	213
—— takes subject to survivorship.....	225
EXECUTORY DEVISE—See DEVISE.....	97
EXPECTANT HEIRS—not to be prejudiced by widow.....	322
EXPECTANT INTEREST—probably not saleable.....	190 <i>c</i> , 253 <i>d</i>
EXPENDITURE ; EXPENSES—of united family defrayed out of the family estate .....	822
authority of the wife as to household — .....	92 <i>a</i>
—— of a coparcener.—See Partition .....	835
previous inequalities of — not taken into account in case of partition .....	763, 836
unless fraudulent.....	835
marriage — of children to be provided for on partition .....	754 <i>d</i> , 781
—— — of a daughter of deceased member must be provided for .....	501 <i>a</i>

\* It is twelve years from the time when the party becomes aware of the exclusion ; but till then there can hardly be exclusion. The condition makes the purchase of property almost as hazardous as if there was no limitation.



	PAGE
<b>FAMILY, HINDU</b> —principle of the — — and gotra adopted by the Śūdras to govern adoption.....	1035
Śūdra's illegitimate sons may <i>inter se</i> form a — — .....	652
and probably also with legitimate half-brothers. <i>ib.</i>	
— — may be formed by prostitutes (Madras) P .....	601
dancing girls cannot form a — — (Bombay)... ..	601a
how regarded as to mutual responsibilities. ....	765,
	973, 1003, 1004
reciprocal rights and obligations .....	601
members jointly liable for common debts .....	611
powers of a member of a — — .....	607, 750b
rights of coparceners in — — .....	608
gift to — — is joint property .....	653
acquisitions of members accede to joint estate ...	764
including manager's gains .....	768a
where one member has disappeared the rest may deal with common property in good faith .....	607
transactions of — — require unanimity according to older authorities.....	603, 604, 607
view of the Viramitrodaya .....	603a
alienation of undivided share now allowed. <i>See</i> Coparcener .....	604, 607c
origin of this.....	605
rights of a grantee from one member subject to rights of coparceners .....	700
suits by — — .....	607, 608
when a — — carries on trade all members must join as plaintiffs in a suit.....	615
suit by one member followed by common suit ...	604
suits against — — .....	617, 618
where there is effectual representation, all may be bound, though not immediately made parties. ....	615
liability of sons for father's acts and suits put on the ground of representation.....	616, 617, 620
where interests are common one member of a — — sometimes taken to represent all in a suit. ....	616
<i>contra</i> .....	642
infants held liable though manager had had no right to defend in their name .....	615
sale or incumbrance by a single member valid in case of urgent need .....	750b, 821

	PAGE
FAMILY, HINDŪ—grantee from one member may enforce partition.	705
a decree against the father may be executed	
against the family property .....	616, 617
inheritance in a — — — .....	65, 339
separation of a — — — .....	656, 795
<i>See</i> Adoption <i>passim</i> ; Alienation; Coparcener;	
Debt 750; Expenditure 822; Illegitimate Son;	
Liability; Manager; Presumption; Property;	
Sacra.	
<i>Family Reunited</i> , described .....	655, 656
— formed only by those who were before united ...	656
FAMILY. NECESSITY—cases showing what is a — — — .....	609b
— a ground for alienation by any coparcener ...	750b, 821
FAMINE—a reason for giving away a son .....	1075
<i>See</i> Adoption.	
FĀRIKHAT .....	838
— or deed of release in case of partition .....	848
<i>See</i> Partition.	
FATHER—once supreme over family estate .....	713
growth of restraints on his authority .....	<i>ib.</i>
in case of — 's incapacity his son takes his place	639,
658c	
— has uncontrolled power before birth or adoption of	
a son .....	642f
son given equal rights with — in grandfather's	
estate come to the father.....	713
gradual development of this right .....	<i>ib.</i>
hence a right of interdiction .....	194
— owner of ancestral estate in same sense as	
sons .....	640
— as manager is by Hindū Law in the same position	
as any other manager ( <i>see</i> below) .....	639
— 's relation to son as joint owner and sole manager	1168f
and representative .....	616, 708
— may deal with share of infant but not of adult son ?	620
— 's power in distributing ancestral and self-acquir-	
ed property.....	770—772, 798, 804ss, 813
— may alien or incumber ancestral estate in certain	
cases.....	169, 170, 193, 639, 641, 749
effect of decrees against — as regards the sons	
620, 707, 708	

<b>FATHER—according to the law of Bombay — cannot alienate</b>	
patrimony without the consent of his sons	631,
	648a, 812
— shown by their attestations	638a
— cannot alien son's inchoate shares (Bengal) ?	313, 314,
	619, 621
— may dispose of ancestral estate on failure of sons	
or separation from them.....	77
rulings of the courts extend his powers	169, 638, 641,
	749
— especially in	
Bengal.....	165
— making excessive alienation presumed deranged.	206
— 's limited power over property a general rule of	
jurisprudence .....	770c
— 's power of distributing at pleasure recognized by	
Jagannātha .....	239
contrary to Mitāksharā .....	ib.
— 's power of distribution amongst sons	772c, 804ss, 813
— cannot make a gift or bequest to one son to the	
prejudice of others, or of a grandson	208, 209, 771,
	808, 809
except of self-acquired property .....	208, 211, 772, 804
— may dispose of self-acquired property	772, 804, 812,
	835
— is free to deal with his own share .....	169
subject perhaps to subsistence of family	193, 194,
	758, 1242
— may make religious gifts within moderate limits.	206
gift by — to adopted son not affected by subse-	
quent birth of sons .....	1229
— cannot wholly disinherit a descendant .....	813
— except for adequate reasons.	585, 587, 812,
	906
— <i>As Manager</i> .....	609, 618ss, 639, 746b
the care of the family especially incumbent	
on — .....	639
— is naturally manager of the joint family estate...	609
— as manager can be superseded for incapacity by	
his son .....	639
— — in same position as mother .....	747
presumption in favour of his transactions.....	637, 638



<b>FATHER</b> —allowed disposal in ways opposed to good management .....	641
—— not liable to pay his son's debts .....	586
—— unless incurred for indispensable duty .....	632
——'s transactions plainly detrimental whether binding on the family estate .....	638
—— may burden inheritance with debts not prodigally contracted.....	169, 193, 643
purchaser or incumbrancer from — bound to inquiry.....	169, 641
son bound to pay debts of — .....	80, 164, 642
son in Bracton's time bound to pay —'s debts out of inheritance in England .....	165
his contracts and obligations pass to the heir ...	80
his promises morally binding.....	206
—— and sacred 747a, 1239—1242	
as also his donations to charities .....	747a
instruments made under distracting influence void by Hindû Law .....	194g, 643
son suing to upset —'s transactions bound to prove his non-liability.....	640, 641
suit against — does not affect sons not joined.	642
liability of the son's share in execution against the — discussed.....	170, 618ss, 631, 707
decree against the — alone will not ordinarily bind his sons as to ancestral property .....	168, 642
but will where decree is against — as representative.....	708
—— where held not to represent infant sons.....	708a
effect of a sale in execution of the interest of the — in ancestral property .....	168, 616, 617e, 642
—— separated from brethren is the origin of a new line of succession .....	77, 1189*
when — inherits.....	110, 341, 364, 399, 453, 454
when — succeeds to his daughter... ..	145, 326, 501, 514, 517
separated preferred to brother separated.....	454
preferred to mother as heir by the Mayûkha	110, 448
—— or ascendant may separate from his descendants at any time .....	657

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\* *for becomes, at this place, read become.*

	PAGE
FATHER—cannot, it seems, separate sons <i>inter se</i> against their will .....	665ss
—— cannot make an unfair partition .....	798, 805
—— may reserve a double share of self-acquired property .....	800
—— or alienate it at his pleasure .....	772
—— held answerable in partition for personal debts... ..	642
in Punjāb a ——'s division revisable at his death .....	666
when —— is entitled to maintenance .....	263, 650, 793, 1167
—— bound to support indigent son .....	793
See Adoption IV. 1024, 1063, 1066; V. <i>passim</i> ; Charges; Debts; Decree 167, 748; Liability; Patria-Potestas; Property; Securities; Suits.	
FATHER'S BROTHER'S DAUGHTER'S SON—see Adoption IV. ....	1062c
FATHER'S MATERNAL AUNT'S SONS—are Bandhus .....	133, 488
FATHER'S MATERNAL UNCLE—is a Bandhu .....	489c
FATHER'S MATERNAL UNCLE'S SONS—are Bandhus.....	133, 488
FATHER'S PATERNAL AUNT'S SONS—are Bandhus.....	<i>ib. ib.</i>
FATHER'S SECOND COUSIN—is postponed to paternal aunt in a divided family? .....	484
FATHER'S SISTER'S SON—is a Bandhu .. ..	492
FATHER-IN-LAW—see Adoption III. 946, 953, 987, 1001ss.	
FEE—gratuity of a woman .....	151
goes to her husband.....	<i>ib.</i>
See Śulka; Strīdhana.	
FELLOW-STUDENT—when inherits .....	137, 342, 481, 500, 574
——'s disciple.....	575
FELLOW-DISCIPLE—inherits .....	562
—— of a Guru, inherits .. ..	563
FEMALE GENTILESHIP.....	284ss
not necessarily indicated by the use of a “matronymic” .....	422d
traces of —— in the law of succession ...	287, 422
sister's son heir to uncle among original tribes...	888a
—— in Malabār .....	656d
amongst Gāros .....	421
—— Khāsyas.....	<i>ib.</i>
—— Koches .....	<i>ib.</i>
—— Nāyars .....	<i>ib.</i>
in Travancore .....	<i>ib.</i>
FEMALE—position of ——s in early times .....	270, 281, 288, 304ss, 877ss, 882, 885

	PAGE
FEMALE—s regarded as chattels in some tribes .....	421
— under tutelage and generally dependent. 253c, 281c, 298	
—'s consequent incapacities.....	254n
— regarded as necessarily dependent by the Teutonic laws and in China .....	271f
gradual recognition of the capacity of —s to hold property .....	267, 273ss
— favoured by Bālabhāṭṭa—see Adoption V. ....	1071
—s may succeed to some priestly emoluments appointing substitutes.....	411
—s may become Gosāvis .....	561, 566
— Vairāḡts .....	572
—s may be excluded by family custom from inheritance.....	740
—s not excluded from succession to inām property..	431
—s could inherit <i>book land</i> in England .....	88a
—s in the Punjab do not transmit inheritance .....	176
—s cannot form a joint family.....	333
— cannot generally transfer her right as wife, widow, or mother.....	254n, 302a
possible exception.....	302a
a gift to —s may be accompanied with power to alien .....	312f, 320d
so as to a devise .....	1113
comparison of the English Law.....	254n
—s generally incapable of inheriting in Bengal and Madras, unless named by special texts.....	126
so in Benares ? .....	ib.
so in Eastern and Southern India .....	127
but not in Western India where the Mitāksharā prevails .....	127, 128
—'s incapacity still recognized in Siālkot .....	270c
— cannot be a Karnam (Madras) .....	343
—s cannot become Sannyāsīs .....	553
married —s are subject to husband's guardianship .....	541
failing him and his family to that of their parents and their kinsmen .....	ib.
what —s are Gotraja Sapinḡdas .....	131
a license to — to use ornaments not a gift of them .....	186
—s can succeed to a vatan .....	343n

	PAGE
<b>FEMALE</b> —s their succession regarded as inheritance.....	654a
—s have inchoate rights of participation which become effective when separation takes place..	653
their rights distinguished from those of males ...	655
—s' share in partition .....	678
their right arises on a partition either voluntary or enforced.....	677b
—s cannot claim partition though entitled to shares.	677
a grandmother in Bengal may sue to sever her share along with dividing parceners' .....	677c
widow of a coparcener in Bengal may sue to sever her share .....	678
others are entitled to maintenance only .....	752
heirs to —s .....	145ss, 501ss
—s unmarried —s .....	145
married —s leaving issue .....	145—152
—s no issue .....	152—153
remote succession to —s governed by same rules as to a male.....	324b
descent through —s in Malabar .....	656d
connexion for succession limited to a single — link in same line .....	498
—s involving several links not admitted .....	492n
<i>See</i> Adoption; Daughter; Gotra; Maintenance; Manager; Mother; Partition; Priest; Sister; Stridhana; Succession; Widow; Wife; Woman.	
<b>FEUDAL SYSTEM</b> —succession under — — compared with that to a principality in India .....	735e
<i>See</i> Inheritance; Rāj; Vatan.	
<b>FCTIONS</b> —become law by adoption.....	882n
<b>FINDER</b> — <i>see</i> Treasure Trove.....	833
<b>FIRST COUSIN</b> — <i>see</i> Cousin .....	136
<b>FIRST COUSIN'S WIDOW</b> —succeeds in competition with her daughter-in-law .....	485
<b>FORFEITURE OF RIGHTS</b> —refusal to adopt not a ground for —	392, 905, 1217
— incurred by widow remarrying... 110, 427, 430, 458, 590	
— not by unchastity subsequent to succession ...	89, 591
subsequent insanity does not cause — — —	580
— of inheritance by a Guru through fornication ...	570
<i>See</i> Adoption VIII, 1218; Maintenance; Unchastity; Widow.	

	PAGE
FORMS OF ADOPTION .....	1086, 1090
Roman — .....	1155c
<i>See</i> Adoption VI. 1125, 1137—1140.	
FORMULAS—of ceremonial law .....	54
— sacred .....	35, 47
their coercive force .....	874
<i>See</i> Adoption IV. 1035 ; VI, 1123ss ; Inheritance ; Śrāddha.	
FORNICATION—a ground of disinheritance in case of a Guru.....	569
girls encouraged by Smṛitis to — with men of	
higher caste .....	884c
<i>See</i> Forfeiture 570.	
FOSTER DAUGHTER—amongst dancers .....	925c
—'s heritable right not recognized .....	454
— is excluded by a brother.....	<i>ib.</i>
<i>See</i> Adoption IV. ....	1068b
FOSTER SON—rights of a — .....	357, 927b
— not recognized as an heir .....	374, 381, 927
— recognized by some castes .....	925, 1212
— may be heir by custom according to a Śāstri's	
opinion .....	925c
advantage of — over adopted son.....	926, 927
<i>See</i> Adoption VII. 1212, 1213.	
FRAUD—repugnant to Hindū Law .....	8, 704, 840
— to be prevented .....	189, 251
— a cause of rescission.....	635
— of manager's transactions.....	750a
— a ground of action against a coparcener .....	611a
and in suit by one.....	750a
— as affecting right to share in partition ...	679, 680, 839
— vitiates a partition' .....	704
and is a ground for suit .....	702e, 706
co-sharer answerable for —.....	764d, 835
— does not deprive him of his right to share .....	835
compensation taken .....	680
— vitiates an adoption .....	1089
— preventing adoption successful in Bengal .....	705
— a ground of action by a widow for maintenance	
against vendee .....	756a
— against creditors, &c., not allowed to be effected	
by partition .....	704
<i>See</i> Adoption III. 996 ; Coparcener ; Manager ; Minor ; Part-	
ition 769 ; Purchaser.	

	PAGE
FRENCH LAW—compared with Hindû Law .....	204a, 597b, 771n
FULL-BLOOD— <i>see</i> Brothers; Succession.	
FUNERAL CEREMONIES—all sons liable for — — .....	747b
responsibility for ——— of a married female...	541c
performance or non-performance does not affect	
heritable right .....	752
<i>See</i> Adoption II. 873; III. 941; VII. 1160; Kriya; Śrāddhas.	
FUNERAL EXPENSES—a charge .....	747, 789b, 799
<i>See</i> Charges on Inheritance 747b.	
FURNITURE—generally indivisible .....	730
FURNITURE—articles, if numerous, may be sold and the proceeds	
divided .....	734
may be kept by coparceners using them .....	785
GAINS OF CHANCE, OF SCIENCE, AND OF VALOUR—when self-ac-	
quired and when joint property .....	725, 726, 728
<i>See</i> Property, Separate and Self-acquired.	
GAINS OF SCIENCE—"science" means the particular profession,	
not elementary education .....	728
right of acquirer to — — — .....	764
— are separate property.....	724ss
<i>See</i> Property, Separate and Self-acquired.	
GAINS OF VALOUR—are separate property.....	ib.
GĀNDHARVA— <i>see</i> Marriage .....	514, 517, 519
GĀRBĀRI— <i>see</i> Gosāvi .....	564
GĀROO— <i>see</i> Tribes .....	287, 288, 421
GAUTAMA DHARMAŚTRA .....	34
GAVALĪ— <i>see</i> Caste .....	407
GENEALOGIES—preservation of — by purohits (family priests)	248n
GENTILES— <i>see</i> Gotrajas.....	129
GENTOOS .....	6
GĀRJAWĀHEE.....	1212
GĀṬASPHOṬA .....	58, 588
<i>See</i> Divorce.	
GĪRI— <i>see</i> Gosāvi .....	565
GIFT—much discussed by Hindû lawyers .....	190
law of — governs wills .....	818
sale had formerly to take the form of — .....	192
— <i>inter vivos</i> can confer only interests recognized	
by law.....	183
— with reserve of ownership invalid...179, 187, 440, 1085	
a mere license to a woman to use ornaments on	
particular occasions not a — .....	186, 294

	PAGE
GIFT—of jewels under English Law .....	186d
———— to persons unborn cannot take effect .....	179, 183
reasonable ——— from parent to be respected ...	208, 811
———— not subject to partition .....	778b
———— resumable if improperly made .....	1241
———— as a contract .....	190
essentials of ——— .....	ib.
transfer of possession generally necessary. 191, 221, 441	
not perhaps amongst near relatives .....	191, 1213
———— void unless completed by delivery ...	179, 207, 685, 695
as against subsequent transferee .....	441
———— of inalienable property void .....	1242
cannot, according to the Mitāksharā law, be made	
of an undivided share...221c, 603, 605, 632, 664, 671c	
except for pious purposes ( <i>see below</i> ) .....	664
nor of ancestral immoveable property ? .....	477, 731d
unless attested by sons .....	638a
as assenting .....	ib.
———— of whole estate subject to provision for wife .....	192
———— limited to self-acquired property minus subsist-	
ence fund of family .....	759, 1242
———— and sale of child forbidden by Āpastamba .....	876d
———— of girl to be expressly in marriage .....	1088
religious ———s in India and Europe compared 192,	
206, 207	
nature of ——— to religious uses .....	19, 197, 200
moderate religious ——— may be made by a father	206
religious ——— inalienable and irrevocable .....	197
———— in Krishnārpana .....	99, 191
every ——— is accompanied under Hindū Law by a	
tacit condition of revocation .....	187
or defeasance .....	187, 441
———— not cancelled under present law.....	441
conditional ——— is invalid according to Vīrami-	
trodaya .....	186
so also under the Mitāksharā .....	ib.
but not necessarily according to Nārada.....	ib.
contingent ——— inoperative save as a promise ...	217
condition precedent may invalidate a ——— 187, 217,	
1085	
———— subsequent invalid if repugnant to law. 187	
limitation to male descendants only is bad .....	182

	PAGE
<b>GIFT</b> —valid though donor retain life-interest .....	191
— cannot be made subject to fantastic directions and limitations .....	196, 721b
— may be accompanied by a trust.....	189, 203ss, 441
trust now enforced .....	441
comparison of the Roman Law.....	441, 817a
— <i>by coparcener</i> —see Alienation .....	407, 609
whether valid against coparceners .....	192
religious — not to be used for other purposes.	817
— to child, wife, or concubine binding.....	194
— to one son upheld against another .....	811
unequal — to a son not generally allowed	208, 209, 807, 811
— of moderate amount to a separated son allowed	793, 807
— by father to adopted son not affected by birth of begotten son .....	1229
— to illegitimate son valid .....	583
— to a daughter.....	208
— valid if provision is made for widow's maintenance .....	414
— of affectionate kindred to wife .....	92
— to a wife by her husband not invalidated by joint interest of sons.....	207
— to wife of heritable interest.....	312f
<i>See Female.</i>	
— of whole property to wife (excluding sons) void...	834
<i>See Alienation ; Father.</i>	
— as a token of affection—see <i>Pritidatta.</i>	
— at the bridal altar (or nuptial fire)—see <i>Adhyag-</i> <i>nika.</i>	
— at marriage—see <i>Yautaka.</i>	
— for maintenance, is a kind of <i>stridhana</i> .....	268
— by a son .....	301a
a sum of money given in lieu of maintenance is <i>stridhana</i> .....	310
— from the brother, a kind of <i>stridhana</i> .....	268, 370, 371
— is valid, if not fraudulent.	293, 295
— from the father, a kind of <i>stridhana</i> .....	268, 370, 371
— from kinsmen .....	519d
— from the mother, a kind of <i>stridhana</i> .....	268, 370, 371
— from a son, a kind of <i>stridhana</i> .....	370, 371
— in the bridal procession—see <i>Ādhyāv&amp;hanika.</i>	



GIFT—on supersession—See *Ādhitvedanika*.

———— subsequent—See *Anvādheya*.

See Adoption II. 922, 923*n*; V. *passim*; VI. 1083, 1086, 1087, 1119, 1126; VIII. 1229; Endowment; Father; Ornaments; Present, 544; Stridhana.

GIRĀSIA .....	448
GIRĀSĪ HAKKS—see Hakks .....	<i>ib.</i>
GIRL—not adoptable, see Adoption IV. ....	1068
GIVER IN ADOPTION—see Adoption II; V. ....	910
GONDS—see Tribes .....	281
GOOD FAITH—protects an alienee from the widow or mother as manager.....	611
See Alienation; Creditor; Debts, 749; Father; Manager; Minor; Widow.	
Gosāvi—ceremonies at initiation of —s .....	558
position of —s in the community.....	553
Śūdras and women may become —.....	553, 934 <i>n</i>
————s are either Purī, Gīrī, or Bhārathī .....	565
————s Kānpātā .....	562
————s are not Sannyāsīs .....	552
difference between Sannyāsīs and —s .....	553
some —s engage in trade .....	<i>ib.</i>
Bhārathī sect of —s marry.....	560
married —s are eligible to mahantship.....	<i>ib.</i>
————s marry in some other cases.....	553, 560
Gharbāri —s .....	564, 565
concubinage allowed by custom of —s .....	553
————s for what actions out-casted .....	558
adoptions by —s .....	933, 934
mode in which —s get their chelās .....	934
relation between — and his disciple differs from true adoption .....	<i>ib.</i>
———— (male) heirs to a — .....	555, 564
natural sons of — may become disciples and inherit.....	559
not the offspring of an adulterous connexion ...	<i>ib.</i>
———— (female) heirs to a — .....	566
See Adoption II. 921; III. 952; VII. 1212; Ascetics; Vairāgis 574.	
Gosāvinī = a female Gosāvi .....	566
See Gosāvi.	
GOTRA—sense of—among lower castes .....	1055

	PAGE
GOTRA—imitation of — relations by the Śādras .....	1035
a woman by marriage enters her husband's —	129, 131
identity or difference of — as affecting adoption	1055ss
<i>See</i> Adoption IV. 1020, 1024; Gotraja.	
GOTRAJA—according to Smṛiti Chandrikā means sprung from	
the family .....	130c
according to Vyav. Mayākha means born in the	
family.....	131
GOTRAJA SAMĀNODAKAS.....	133
<i>See</i> Samānodakas.	
GOTRAJA SAPINDAS—who are included in the term. 114—132, 463ss,	
537.	
table of — — .....	123b
enumeration of — — given by Vijñāneśvara	
not exhaustive .....	118, 119, 123
meaning of — — according to the Mitāksharā	129
————— Vyav. Mayākha...	131
division of — —.....	116
Samānagotra the same as — — .....	129
———— distinguished from Bhinnagotra Sapindas .....	531
what females are — —.....	131
order of — — .....	116, 117, 463ss, 479
———— inherit according to their nearness to the de-	
ceased .....	114
succession of — —.....	473ss, 48
collateral succession of — — stops with	
grandson of the ascendant in Madras .....	124
in Bengal with great-grandson of the ascendant .	ib.
GOVERNMENT— <i>see</i> Adoption III. ....	955, 1009—1011
GRAND-AUNT, PATERNAL—entitled to maintenance .....	354
GRAND-DAUGHTER—is a Bandhu .....	497
———— cannot inherit in an undivided family .....	ib.
———— may inherit in a divided family.....	ib.
————'s succession to a female .....	509
———— is heir to her grandmother .....	151, 509
GRAND-DAUGHTER'S SON .....	497
<i>See</i> Bandhu; Sapinda.	
GRANDCHILDREN—not entitled to maintenance.....	758c
———— entitled according to Mitāksharā.....	758c, 1242
GRANDFATHER—is a gotraja .....	116
———— may separate from his descendants at any time.	657

	PAGE
GRANDFATHER—grandson bound to pay debts of ———	80, 1240
when ——— succeeds.....	116, 461, 473
<i>See</i> Adoption V. 1073, 1081; VII. 1183; Debts; Grandson.	
GRANDFATHER'S (PATERAL) BROTHERS—are gotrajas .....	117
GRANDFATHER'S (PATERAL) BROTHER'S SONS—are gotrajas. <i>ib.</i>	
when inherit .....	479, 480
GRANDMOTHER (PATERAL)—cannot demand partition .....	677
but may in Bengal ( <i>see</i> Females.) .....	677c
but on partition is entitled to a share.....	780, 824c
——— when succeeds.....	113, 461, 473
——— has a special place assigned to her .....	113
special ground for her succession according to	
Smṛiti Chandrikā .....	130c
——— preferred to step-mother.....	471
GRAND-NEPHEW— <i>see</i> Adoption IV. ....	1029
GRAND-NIECE (MATERNAL)—takes with the same power of aliena-	
tion as a daughter or sister .....	499
GRANDSON—entitled to maintenance? .....	758c, 1242
——— cannot control grandfather's alienation with his	
father's consent .....	803
———'s right of inheritance .....	68, 78, 339, 389
——— may separate by agreement .....	659
———'s right to partition with grandfather not directly	
recognized .....	800, 801
it arises only after his father's death,* .....	658, 801
———s take a share equal together to their father's.....	659
——— takes his father's place on the exclusion of the	
father .....	906f
——— takes mother's share by representation when	
mother dies between death of her father and	
actual partition.....	111
——— not to be defrauded by grandfather's gift to a	
son .....	809
——— of the maternal uncle of the mother may inherit.	499
——— of a sister .....	<i>ib.</i>
<i>See</i> Adoption II. 905, 917; III. ....	943, 944, 946
GRANDSON BY ADOPTION—succession of ——— in undivided family. 71,	
651	
succession of ——— in divided family .....	81, 389

\* *See* Mitāksharā, Chap. I. Sec. V. para. 3 note; Vyavahāra Mayākha Chap IV. Sec. II. para. 2.

	PAGE
GRANDSON, ILLEGITIMATE—succession of — of a Śūdra .....	72
legitimate son of illegitimate son takes half-share of his father among Śūdras .....	82, 390
GRAND-UNCLE— <i>see</i> Grandfather's (paternal) Brothers.	
GRAND-UNCLE'S GRANDSON—is a Gotraja Sapiṇḍa .....	481
GRAND-UNCLE'S SON.— <i>see</i> Grandfather's (paternal) Brother's Sons.	
GRANT—construed so as to be effectual.....	183
the words "aulād aḥād" in a — how construed	184a
— to be preserved for designated purpose .....	184
a village taken by — to one is self-acquired property.....	721, 725n
religious — favoured by Hindū Law .....	216n
— cannot be alienated .....	741d
a — may be impartible .....	744
— by the sovereign may make an estate impartible	180, 200
— treated as separate property disposable by grantee	806
a condition against alienation is generally void...	188
the extent of estate conferred by a — in Bombay .....	721b
tenure of — to support an office .....	744
— not divisible to prejudice of service .....	742
— cannot be resumed .....	197, 398
— not voidable by the executive .....	722
— binds grantee to its terms .....	ib.
he cannot enclose pasture-lands appendant to village holdings.....	ib.
not liable to debts of holder after his death .....	739
except in case of confiscation .....	ib.
grantee's mortgage upheld against an escheat ...	722
holder of a jāgir or saranjām can make a — for his own life.....	721n
succession to — governed by its nature .....	742
śrotriyaṃ is descendible to grantee's sons only	725b
— a public devolve according to special terms pre- scribed .....	179
— distinguished from private.....	180
— to a man, his children, and grandchildren confers an absolute estate.....	463, 721
— to united brethren constitutes a joint tenancy...	76, 709
— by a father to his illegitimate son for his mainten- ance is valid .....	379, 583

	PAGE
GRANT— in favour of persons not in existence fails with the estates dependent on it .....	182
—— to mistress— <i>see</i> Saranjām .....	762b
<i>See</i> Adoption VIII. 1233; Brothers; Endowment; Inām; Interpretation; Śrotriyaṃ.	
GRANTEE—adopting should obtain consent of grantor .....	1208
<i>See</i> Adoption VII.; Grant.	
GREAT-GRANDFATHER .....	117, 473
—— may separate from his descendants at will.....	657
<i>See</i> Adoption III. ....	954
GREAT-GRANDMOTHER.....	117, 119, 473
—— entitled to inherit according to Mitāksharā .....	127
GREAT-GRANDSON.	
—— s through different sons are Gotraja Sapinḍas ...	481
position of —— in a partition .....	672
when he inherits.....	63, 65, 78, 140
—— in the male line precedes a daughter's son.....	390
—— of the fifth ancestor succeeds before his father's sister's son.....	487
GREAT-GRANDSON BY ADOPTION—succession of —— .....	71, 651
GREAT-GRANDSON'S SON } is not entitled to any share .....	672a
GREAT-GREAT-GRANDSON } does not take share .....	654
but —— succeeds as a Gotraja Sapinḍa ...	655
GREEK CUSTOM—as to exposure of infants.....	213c
GREEKS— <i>See</i> Adoption VI. ....	1082
GRIHASTHA AVIBHAKTA.....	58
—— VIBHAKTA .....	58
GUARDIAN—till eight years of age the mother is —— .....	438
under Maithilā law mother preferred to father as —— .....	355
adoptive mother preferred as —— to adopted son. ....	1231
so in case of a widow .....	371
natural father is not —— while adopted parents live .....	673a
a near relative has the best right to ——ship of a minor .....	401
a paternal relation preferred .....	438, 673a
——ship of female sought by husband, she denying the marriage.....	541
—— over a female is vested after marriage in the husband, his sons, and his sapinḍas.....	322, 541
nature of this ——ship .....	232

<b>GUARDIAN</b> —husband's family being extinct, parents and their kinsmen are the —s of a woman .....	233, 541
on failure of both the king is — .....	541
a person cannot be appointed — or administrator against his will .....	672c
—— <i>ad item</i> may be appointed when there is no administrator .....	ib.
an officer of the Court may be appointed — ...	ib.
—— may demand partition for the minor.....	674
—— — sell to maintain a suit for the minor's benefit .....	672c
alienation by an unauthorized — .....	368
<i>See</i> Adoption VII. 1174, 1179 ; VIII. 1231 ; Age ; Female 541 ; Minor.	
<b>GŪPHAJA</b> .....	893
<b>GUJAR</b> — <i>see</i> Caste .....	476
<b>GUJARĀT</b> —peculiarities of the law in — .....	11
<i>See</i> Adoption II., VII ; Custom ; Father ; Mother ; Sister ; Widow.	
<b>GURAVA</b> —interest of a — in the temple land is alienable.....	785
<i>See</i> Castes and Classes.	
<b>GURU</b> —position of — in a temple or maṭha.....	554, 555
relation of — and his disciple somewhat resembles adoption .....	933
—— bound to maintain his chelâ in distress .....	793f
—— succeeds to a Vairâḡi by custom .....	574
—— disciple .....	500
—— nominates a chelâ as successor .....	556
succession of disciples to — .....	554, 568
succession to — limited to one disciple .....	499
<b>GURU BAHĪNA</b> .....	571
<b>GURUBHĀT</b> —is heir to a Vairâḡi.....	574
<i>See</i> Fellow-disciple.	
<b>GURU'S FELLOW DISCIPLE</b> .....	563
<b>GURU-ŚISHYAS</b> .....	570
<b>HAKKS</b> .....	339
—— are immoveable property .....	772d
<b>HALF-BLOOD</b> — <i>see</i> Brother.	
<b>HALF-BROTHER</b> — <i>see</i> Brother.	
<b>HALF-BROTHER'S SON</b> —is a sapinḍa according to Vyav. May .....	113
—— succeeds to his aunt.....	546
<i>See</i> Adoption IV. 1024.	
<b>HALF-SISTER</b> —is a gotraja sapinḍa .....	470
—— may be included in “bhâgini” .....	469

	PAGE
HALF-SISTER—preferred to step-mother.....	470
——— uncle's widow.....	<i>ib.</i>
doctrines of Viv. Chintāmani and Vyav. Mayā- kha .....	<i>ib.</i>
HEIR—meaning of — under English Law and Hindū Law compared .....	648
<i>See Dāya.</i>	
——— expectant— <i>see</i> Reversioner.....	96ss
——— presumptive, cannot sue for declaration of his right .....	391
<i>See Female.</i>	
HEMĀDRI .....	9
HEREDITARY OFFICES—now regulated by enactments .....	745
——— how divided .....	784
——— must not leave the family of the office holder.....	745
<i>See Vatan.</i>	
HĀRĪTA .....	40
HERES NECESSARIUS .....	188
HERITABLE RIGHT—of the widow discussed .....	90
<i>See Birth ; Inheritance ; Widow.</i>	
HERITAGE—rests on positive law.....	8
——— under Hindū Law implies ownership .....	452
woman's — ranked as Strīdhana .....	145
<i>See Dāya ; Heir ; Inheritance ; Strīdhana.</i>	
HINDŪ LAW—operation of — — .....	1ss
application of — — authorized by the legis- lature .....	1
——— assisted by equity .....	7, 8
conflict of laws of different communities .....	5
when law of defendant prevails .....	5, 6, 7
——— its connexion with religion and ethics .....	8
religious element preponderates in — — ...	239
scope of ancient — — purely religious.....	55a
——— rather personal than provincial .....	3
sources of — — of a sacred character.....	9, 1069
——— based on the Smṛitis.....	54ss
authorities on — — .....	9
conflict between — — books .....	11a
criticism of — — necessary .....	8, 9
——— often turned into verse .....	55a
custom, basis of — — .....	1
——— tends to conformity with written — —	9

- HINDU LAW**—allows all classes of Hindûs to be governed by  
     their own customs..... 597a, 870  
     general ——— superseded by particular custom. 2  
     ————— modified by custom ..... 155  
     but ——— ——— regulates all beyond ... 2  
     customary law of inheritance may be changed ... 3  
     ————— capable of development ..... 551n  
     analogy to the English Law ..... *ib.*  
     history of ——— ——— ..... 8, 56  
     ————— developed under the control of religious ideas... 54, 55n  
     ————— of the Śâstras extends in operation with the in-  
     creased complexity of affairs ..... 926b  
     ————— binds the Jains in the absence of special custom. 157  
     ————— binds the Khojas in the absence of special custom *ib.*  
     ————— undoes what is done fraudulently..... 8, 9  
     every important duty prescribed by a Smṛiti  
     legally enforceable under ——— ———..... 240, 242  
     distinction between religious and legal obligations  
     not clearly drawn ..... 240  
     *See* Adoption I. 860ss; V. 1078, 1080n; VI. 1085, 1086, 1087,  
     1088; VII. 1197, 1204; VIII. 1215; Apostasy  
     597; Equity; Interpretation; Smṛitis.
- HINDU LAW OFFICER**—*see* Law Officer.
- HINDÛS, ARYAN** ..... 1082
- HINDU WILLS ACTS**—  
     XXI. of 1870 ..... 224, 1233  
     V. of 1881..... 225  
     *See* separate List at the beginning.
- HIRANYAKESĪ SÛTRA** ..... 34
- HOMA SACRIFICE**.—*See* Adoption II; IV; VI.
- HOUSE**—built on ancestral land by coparcener with his separate  
     funds is not subject to partition ..... 778, 779  
     why family dwelling was considered indivisible  
     property ..... 781, 785  
     *See* Residence.
- HOUSEHOLD GODS**—custody of ..... 784e  
     *See* Idol.
- HUSBAND**—authority of—*see* Adoption V. .... 1069, 1070, 1071  
     ————— is guardian of his wife ..... 322, 541  
     ————— takes gifts made to his wife by strangers ... 292, 295  
     ————— takes his wife's earnings..... 292  
     even those by prostitution ..... 516



	PAGE
HUSBAND—deserting wife must maintain her to the extent of	
one-third of his property.....	593b
inherits, failing children .....	152, 513—516, 543
wife's Stridhana if married according	
to the approved forms .....	326ss, 517, 527
of "Pāt" wife when inherits .....	516
alienation by — depriving his family or widow	
of subsistence is invalid .....	241a, 1242
so as to devise .....	1158c
's brother's succession .....	527
's sapindas succeed to a female .....	517ss
HUSBAND AND WIFE—not generally capable of mutual contracts.	254s
<i>See</i> Marriage.	
HUSBAND'S BHINNAGOTRA SAPINDAS— <i>see</i> Sapindas.	
HUSBAND'S BROTHER— <i>see</i> Brother-in-law .....	525, 527
HUSBAND'S BROTHER'S SON—inherits.....	529
<i>See</i> Adoption IV. ....	1025
HUSBAND'S BROTHER'S WIDOW.....	531
HUSBAND'S COUSIN.....	531, 532
excludes husband's sister's son.....	533, 536
excludes husband's sister and son-in-law.....	532
HUSBAND'S DISTANT KINSMEN .....	534
HUSBAND'S HALF-BROTHER—inherits .....	525, 528
HUSBAND'S INJUNCTION—a widow may adopt husband's bro-	
ther's son without — .....	1025
<i>See</i> Adoption I.	
HUSBAND'S PATERNAL UNCLE'S GREAT-GRANDSON .....	533
HUSBAND'S PATERNAL UNCLE'S SON.....	531, 533
HUSBAND'S RELATIVES—as heirs to a woman.....	526ss
extent of recognized connexion (Bengal) .....	539a
<i>See</i> Stridhana.	
HUSBAND'S SAPINDAS— <i>see</i> Sapindas of the Husband .....	153
<i>See</i> Adoption III ; Female ; Widow.	
HUSBAND'S SISTER—preferred to distant cousins.....	537
inherits as a Sapinda .....	538
HUSBAND'S SISTER-IN-LAW .....	531
HUSBAND'S SISTER'S SON.....	538
is excluded by husband's cousin .....	532
HUSBAND'S SISTER'S SON'S SON .....	538
HUSBAND'S UNCLE'S GREAT-GRANDSON.....	533
HUSBAND'S UNCLE'S SON .....	531

	PAGE
<b>HYPOTHECATION</b> — <i>See</i> Alienation; Coparcener; Debt; Father; Mortgage; Widow.	
<b>IDIOT</b> —disqualified for inheritance.....	153, 576, 579
when his idiocy is congenital .....	155
—— not disqualified for taking by conveyance .....	823
<i>See</i> Disqualification.	
<b>IDOL</b> —ideal personality of — recognized.....	185b, 201
endowments of — .....	201
property dedicated to an — .....	160, 785
property subject to trust for — partible .....	742
custom as to distribution of —s .....	830
family —s generally remain with the eldest.....	784c
refusal to give up an — for worship a cause of action ...	<i>ib.</i>
<i>See</i> Charity; Eldership; Endowment; Perpetuity; Property, Sacred.	
<b>IGNORANCE</b> —deprives acquiescence or consent of usual effect...	1227
—— inducing mistake in partition a ground for suit. .	702e
<b>IGNORANTIA LEGIS NON EXCUSAT</b> —discussed .....	1226as
<b>ILLATAM</b> .....	421c, 422
<i>See</i> Son-in-law.	
<b>ILLEGAL DIRECTIONS AND TERMS</b> —void— <i>see</i> Adoption, III., VI., VII; Grant; Partition; Will.	
<b>ILLEGITIMACY</b> --is a disqualification to inherit among higher castes, but not among Śūdras .....	64, 72, 81, 140
<i>See</i> Illegitimate Son.	
<b>ILLEGITIMATE BRĀHMAṆA</b> —takes only what his father gives to him .....	474
<b>ILLEGITIMATE BROTHERS</b> — <i>see</i> Brothers.	
<b>ILLEGITIMATE CHILDREN</b> .....	582, 583
<b>ILLEGITIMATE DAUGHTER</b> — <i>see</i> Daughter, Illegitimate.	
<b>ILLEGITIMATE GRANDSON</b> — <i>see</i> Grandson, Illegitimate.	
<b>ILLEGITIMATE GREAT-GRANDSON</b> —succession of — — of a Śūdra .....	72
<b>ILLEGITIMATE SON</b> —	
——s of a European not a joint family .....	4
——s of higher castes cannot claim inheritance.....	154, 582
—— superseded by adopted son.....	1188
—— excluded from succession to a rāj .....	158
—— excluded from succession under Lombard law .....	82b, 380a
—— once favoured by English law .....	377b
—— of higher castes can claim maintenance only .....	82, 194,
263, 388, 582, 583, 776*	

	PAGE
ILLEGITIMATE SON—of higher castes can claim maintenance, but not as a charge on the property.....	263
—— of a brother awarded maintenance .....	582a
in higher castes a father may make a grant to —— .....	263, 379, 583
—— irrevocable by after-born legitimate son.	583
Of Śūdras.	
—— inherits .....	72, 81, 82, 389, 415, 447
—— inherits collaterally by custom .....	83
position of ——— when recognized by his fa- ther .....	83, 415
—— supposed to take equally with legitimates .....	383
this questioned .....	ib.
—— inherits half a share if legitimates living.....	81, 381
—— takes precedence of legitimate son's daughter.....	380
—— assigned equal share with daughter .....	503
—— takes the whole estate on failure of daughter's sons .....	72, 381
a Śūdra's right to disinherit ——— limited .....	385
—— s joint <i>inter se</i> .....	383, 651
—— s may form a united family with legitimate half- brothers .....	84, 383
—— is entitled to half a share on partition .....	780
—— to a full share at his father's choice.....	381, 775
but not greater than a legitimate son's share ...	381
See Son.	
IMAGE—see Idol.	
IMITATION—of higher by lower castes .....	426
—— of nature—see Adoption III. 947; IV .....	1032
IMMORALITY—of debt of father as affecting son's liability 619ss, 641 son required to prove ——— .....	623, 642d
IMPARTIBILITY—not identical with inalienability .....	159, 398
principle excluding division on death applies to division by alienation .....	159
—— no ground for succession as to separate estate ...	740
See Alienation .....	741d
IMPARTIBLE PROPERTY—see Property, Impartible.	
IMPEDIMENTS TO SUCCESSION—see Disqualification.	
IMPLEMENTS—see Tools and Implements.	
IMPOTENCE—disqualifies for inheritance .....	153, 576, 579, 587
—— as affecting capacity to adopt—see Adoption III. 950; Disqualification .....	576

	PAGE
IMPROVIDENCE—of father .....	624c
<i>See</i> Debt 194, 711; Interdiction.	
IN EXTREMIS— <i>see</i> Adoption III. ....	949, 950
INALIENABILITY— <i>see</i> Alienation; Estate; Impartibility; Ownership.	
INĀM .....	180
_____ ranks generally as ordinary ancestral property.	397
_____ is self-acquired property of individual grantee.	721, 724a, 725b
_____ resumed and rebestowed held separate property	724a
_____ is generally partible .....	397, 829
re-imposition of land-tax does not change estate.	724a
_____ held subject to ordinary rules of succession .....	841
inheritance and partition of an — determined	
by the grant .....	737b
settlement of — on wife to exclusion of son?	806
<i>See</i> Escheat; Grant 806; Interpretation.	
INĀMDĀR—may have different rights under the same grant.....	397
subject to rights previously created.....	398
_____’s relation to tenants .....	397
INCEST—became revolting in Vedic times.....	281b
child by — has no right of inheritance.....	582a
theoretical — a bar to adoption.....	1032
<i>See</i> Adoption IV. 1035.	
INCONTINENCE—annuls right to maintenance except of the wife	
and the mother .....	592, 593
_____ a ground of disinheritance in case of a widow.	590, 591
but not for retraction .....	591
_____ of widow not a cause of forfeiture in Bengal .....	257
effect of — on the succession of mother .....	591
_____ of daughter .....	ib.
comparison of the English Law .....	591a
<i>See</i> Family; Unchastity 591.	
INCONVENIENCE—of division <i>in specie</i> at partition considered...676,	
830, 832	
INCREASE—of share effected by death of coparcener during	
pendency of suit for partition.	683
_____ before partition .....	683d
_____ after partition.....	682, 703n
INCUMBRANCE— <i>see</i> Alienation 162; Debt; Estate; Father;	
Mortgage; Trust 188; Trustee 555.	
INCURABLE DISEASE—is a disqualification to inherit .....	154, 576
persons afflicted with — — must be maintained	578

	PAGE
INDIGENCE—revives the claims of father and son to subsistence	
after partition .....	793
of family to be guarded against in alienation .	648a,
	759n, 1242
<i>See</i> Alienation ; Maintenance 793.	
INDIVISIBLE PROPERTY— <i>see</i> Property, Indivisible.	
INFANTS—exposure of — in Greece and Rome .....	213c
<i>See</i> Age ; Guardian ; Minor.	
INFIRMITY—in body or mind disqualifies a person to inherit.	153,
	154
INHERITANCE—definition of — .....	57
customary law of — may be changed .....	3
law of — not affected by emigration.....	ib.
determined by the law of the defendant .....	5
as a source of property .....	60
above individual will .....	59, 177, 178
course of devolution not alterable by private	
agreement .....	177
direction of a line of descent unknown to the law,	
inoperative .....	ib.
once regarded as impartible and inalienable .....	271
and partition as viewed by Hindû lawyers .....	599
distinguished from partition .....	60
historical development of the law of — .....	ib.
special rules of — .....	155ss
in tail male not known to Hindû Law .....	61
law of — in what sense regulated by funeral	
oblations.....	62
heir takes estate as a “universitas” .....	162
under Hindû Law heir continues the person	
and family with which he has been identified	59, 67n
under the Roman Law.....	ib.
according to Vyav. May. is an inseparable ag-	
gregate of rights and obligations.....	162, 165n
the rules of — under Mitâksharâ come into	
operation only as to separate estate.....	457
not postponed by pregnancy .....	1011
right to — not extinguished by separation.....	357
sub-divisions of the law of — .....	58, 59
obstructed and unobstructed.....	63, 599, 711
right of succession arises as in partition on the	
death of propositus .....	68

	PAGE
<b>INHERITANCE</b> —coparceners of the deceased; when they inherit... 73	
no property of male to pass from family while a member survives .....	520
—— by females— <i>see</i> Custom; Daughter; Mother; Sister; Stridhana; Widow.	
—— collateral— <i>see</i> Adoption II. 938; VII. disqualifications for — enumerated. 576, 584, 585,	587
<i>See Disqualification.</i>	
son previously adopted by one becoming dis- qualified to be provided for .....	1202
—— in cases of inalienability .....	313, 319a
—— to Bhāgdāri and Narvadāri lands governed by Hindū law and custom .....	745
in Gujarāt males preferred to females .....	431
burdens on — .....	160ss
—— through females .....	656d
<i>See Female Gentileship.</i>	
debts not prodigally contracted.....	193
<i>to Females.</i>	
sister preferred to husband's sister .....	328
son by first husband preferred to second hus- band's family .....	328, 329
special doctrine of Vyav. Mayūkha .....	329e
—— <i>to Ascetics</i> — <i>see</i> Ascetic; Preceptor.	
<i>See</i> Adoption III. 941, 947, 950, 993, 1011; VI. 1089, 1108; VII. 1161, 1194, 1209; Brahmāchārī; Brother; Descent; Devolution; Emigration 3; Naishṭhika; Succession.	
<b>INITIATION</b> .....	928n
—— of a Jangama.....	567
—— in relation to adoption.....	1145a, 1207e
—— to be provided for out of joint property. 754d, 782c,	821
<i>See</i> Marriage.....	1061
<b>INSANE, INSANITY</b> —does not necessarily prevent marriage .....	908
—— of the son born with respect to adoption.....	ib.
—— disqualifies for inheriting .....	153, 576, 579, 580
and for share in partition .....	679
but does not cause forfeiture .....	580
<i>See</i> Adoption III. 946, 948, 949, 958; V. 1077; Disqualifi- cation 576, 580.	
<b>INSENSIBLE</b> — <i>see</i> Adoption III. ....	948, 949

	PAGE
INSTRUMENTS—executed under disturbing influences void by Hindû law .....	641, 643
See Adoption; Deed 680; Documents 1142; Grant; Interpretation; Registration; Will.	
INTELLIGENCE—see Adoption III .....	948, 949
INTENTION—unequivocal, of partition constitutes partition ...	841, 856
INTERDICTION—son's right of — against waste. 194 <i>g</i> , 639, 714 <i>n</i> , 810	
— by adopted son .....	1169
— by coparcener against sale by another allowed in Madras ? .....	707 <i>c</i>
INTEREST—compound — not disapproved by Hindû law .....	746 <i>a</i>
utmost — recoverable = the principal (dâmdupat) .....	<i>ib.</i>
rule of dâmdupat applies to some mortgages.....	786 <i>f</i>
— — — — — when the defendant is a Hindû .....	786
— may be turned into principal by a new account...	746 <i>a</i>
— vested—see Adoption III. ....	1006
INTERPRETATION—principles of — .....	6, 11, 265 <i>b</i> , 774
— to be consistent with texts.....	14 <i>a</i>
— of texts.....	199 <i>b</i> , 266 <i>n</i>
governed by custom.....	869
every text must be given effect to if possible.....	125
when different objects are included in a class by different Smritis the class is to embrace all ...	269 <i>f</i>
— of texts influenced by philosophical systems. 8, 125,	265 <i>b</i>
rules of — .....	14 <i>a</i>
— etymological preferred to technical .....	148
equitable — approved .....	831
— according to the reason of the law .....	767
“Dikpradarâsana” or extension of a rule to analogous cases .....	108, 540, 866
strained analogies to be avoided .....	199 <i>b</i>
contradictions in Hindû Law books how settled. 11 <i>a</i>	
discrepancies in sacred writings must be reconciled .....	861 <i>b</i> , 880 <i>c</i>
inference by reasoning to be preferred to the assumption of a plurality of revelations .....	861 <i>b</i>
— of a special rule when a general one exists .....	880 <i>c</i>
Smritis are construed by reference to the one taken as a subject of commentary.....	269 <i>f</i>

	PAGE
INTERPRETATION—where a particular purpose is assigned as a ground for a permission this implies a prohibi- tion where the purpose is already attained.....	905e
a prohibition resting on essentials is indispensa- ble; not one resting on incidental matter .....	909a
—— of Mitāksharā .....	18
meaning of half-a-share .....	72
rules of — by the Courts .....	870
—— governed by decisions .....	871
—— to be drawn from within the Hindū Law.....	199b
—— of private documents .....	463
actual notions of Hindūs to be adverted to.....	670
—— according to the situation of the parties .....	781a
extensive — of document showing family cus- tom of succession.....	743
words indicating males may include females .....	670
repugnant provisions void .....	760
and those imposing restrictions disapproved by the law .....	ib.
See Agreement; Partition; Property.	
instruments are construed so as to express some- thing legal according to Hindū Law .....	183, 184
—— of a deed allotting money, &c., to a widow accord- ing to situation of parties .....	781a
—— of gift by husband to wife.....	301c, 312f, 320d, 1113
—— of grant to a widow and other heirs.....	299a
—— of the words “aulād aḥlād” .....	184a
—— of wills and testamentary instruments. 183, 224, 228, 229, 668n	
will construed as a family settlement .....	184
—— of “putra paoṭrādi krāme” .....	230, 670
—— of “mrityu patras” .....	222
See Custom, Family 743; Equity; Grant 184a, 463, 721; Hindū Law; Smṛiti; Text; Will.	
INTERPRETERS—of ceremonial law .....	54
INVESTITURE—age of .....	1061n
rites of — .....	1036c
See Adoption III. 899n; IV. 1033; VI. 1123, 1129, 1130.	
INVESTMENT—to be made to secure maintenance of widow .....	762
—— of concubine... ..	762a
INVOCATION—see Adoption IV. 1020; VI.....	1082
IRISH LAW, ANCIENT—as to property retained undivided in partition .....	730b



	PAGE
IZÂFATDÂR—not a proprietor .....	721b
JÂGIR.....	173, 179
—s are grants of the revenues.....	173
—s are impartible .....	173, 745n
holder of — can make a grant for his own life .....	721b
— resumable at pleasure of the sovereign .....	173
— an exception to the rule of devolution.....	179, 737b
— devolves according to the character of the grant .....	737c
succession to a — by primogeniture.....	745n
<i>See</i> Saranjâm 745.	
JAINS—divided into Yatis, devotees, and Śrāvakas.....	568
— deny the authority of Vedas .....	ib.
— are Pāshandas .....	ib.
— have no kṛtya ceremonies .....	1050e
— — śrāddha or paksha ceremonies .....	901a
— are subject to Hindū law of inheritance in the absence of special custom .....	157, 923n
<i>See</i> Adoption III. 952, 973; IV. 1038, 1050e.	
JALA SANKALPA .....	1119, 1126
JANGAMA—s are Lingāyat priests .....	567
—s are married in some maṭhas .....	568
— heirs to a — .....	567
the head — appoints his successor .....	568
JANGAMA-DĪKSHĀ .....	567
JĀTAKARMA = birth ceremony .....	1056n
JATI—heirs to — .....	568
<i>See</i> Yati.	
JĀTS— <i>see</i> Tribes .....	281b, 417, 423a
JEWELS—possession of — does not affect widow's right to maintenance .....	755c
<i>See</i> Ornaments; Partition 207, 310n.	
JÑĀTI— <i>see</i> Adoption III. ....	1006
JOGTIN .....	527
JOINDER—all interested in pressing a claim must be joined in a suit .....	608a
and in a demand .....	ib.
comparison of English Law .....	610c
JOINT FAMILY— <i>see</i> Family.	
JOINT LESSORS—must jointly re-enter .....	608a
JOINT OBLIGATIONS—are indivisible .....	731

	PAGE
JOINT TENANCY (English)—difference between — — and Hindû joint estate.....	601a
<i>See</i> Brethren; Coparceners.	
JOINT-TENANT—severs by sale .....	705c
<i>See</i> Tenant, Joint 671c.	
JOSHI VATAN— <i>see</i> Vatan .....	487
JOSHI VATANDÂR—may recover damages from an intruder .....	398
——— presumed to be entitled to officiate in a particular family .....	ib.
——— may be compelled to perform his duties .....	ib.
JUDGMENT—on a contested adoption not <i>in rem</i> .....	1234
——— not evidence where parties are different ... ..	ib.
<i>See</i> Adoption VIII. 1234; Res Judicata.	
JUDGMENT-CREDITOR—of coparcener can demand partition. 605, 657, 663	
<i>See</i> Brother; Coparcener; Creditor.	
JURISDICTION .....	239, 240
——— of the Courts is recognized over any question that the caste cannot settle .....	1007c
incidental cognisance of religious and caste ques- tions .....	599n
<i>See</i> Adoption VIII. 1215; Hindû Law; Obligation .....	903
KABÎR .....	572
KALAVÂNTIN— <i>see</i> Adoption II. 933a; III. 1016; IV. ....	1068
KALIYUG— <i>see</i> Adoption V. ....	1081
KAMALÂKARA—author of the <i>Nirṇayasindhu</i> .....	23
in what estimation his writings are held.....	ib.
his parentage.....	ib.
his writings and date .....	24
KĀNAM MORTGAGE .....	285n
KANARĀ—mortgage in — .....	732n
assent of the village community formerly taken to a grant in — .....	733n
KĀNGRA DISTRICT— <i>see</i> Tribes .....	376
extra share of eldest son in — — .....	805a
KĀNĪNA .....	893
KANŌĪ CASTE.....	347
KĀNPĪHĀ Gosāvi .....	562
KARNAVAM— <i>see</i> Manager .....	609d
KARTĀ—position of — .....	766
alienation by — on whom binding .....	637e
<i>See</i> Manager.	



	PAGE
<b>KṚITRIMA</b> —still recognized in Maithila .....	894
<i>See</i> Adoption III. 1016; IV. 1067; VI. 1121, 1143, 1146 <i>d</i> ;	
VII. 1209; Karta-Putra; Son 893.	
<b>KṛīYA</b> — <i>see</i> Jains 1050 <i>e</i> ; Funeral Ceremony.	
all sons liable for father's — .....	747 <i>b</i>
<b>KSHATRIYAS</b> —a division of Hindūs .....	64
——— said to have disappeared.....	921 <i>h</i>
Gāndharva form of marriage lawful for — .....	514
——— may become Sannyâsis .....	552
<i>See</i> Adoption IV. 1054; VI. 1135 <i>c</i> .	
<b>KSHETRAJA</b> = son begotten by an appointed kinsman.....	753 <i>c</i> , 893
——— placed by Yājñ. next to appointed daughter's son..	419
——— still recognized by custom in Orissa .....	550 <i>a</i> , 868
<i>See</i> Son, 893.	
<b>KULĀCHĀRA</b> = family custom .....	156 <i>c</i> , 740
operation of — .....	158, 740
<i>See</i> Custom, Family.	
<b>KULADHARMA</b> = worship of the tutelary deity .....	851 <i>c</i>
<b>KULKARṆĪ</b> — <i>see</i> Vatan .....	354, 438, 487, 510
<b>KUṆABĪ CASTE</b> .....	356, 360, 416, 427, 502, 516, 532, 565, 844
<b>LĀBHA</b> .....	268, 292
<b>LAGNA WIFE</b> — <i>see</i> Wife.	
<b>LAKṢMĪDEVĪ</b> — <i>see</i> Bālabhāṭṭatikā.	
<b>LAMENESS</b> —disqualifies for inheritance .....	153, 576
——— taking on partition .....	822
——— gives a title to maintenance .....	578
<b>LAND</b> —property in — and modes of holding it discussed. 170 <i>ss</i> ,	
732 <i>ss</i>	
<b>LANDLORD AND TENANT</b> —relation of — — not altered by	
omission to take rent .....	1235
occupier and superior not always in this relation. 696,	
697	
<b>LAPSE</b> — <i>see</i> Grant; Forfeiture. 89, 110, 427, 430, 458, 570, 577,	
580, 590, 591	
<b>LAUGĀKṢHĪ SMṚITI</b> .....	50
<b>LAVĀJIMĀ OR LĀJIMA ALLOWANCE</b> .....	339
<b>LAW</b> —power of Mahomedans to convey not measured by Hindū	
law .....	6
——— applicable dependent on personal status.....	4
the Greeks and the Romans regarded their —s	
as of divine origin .....	55 <i>n</i>
<i>See</i> Hindū Law.	
<b>LAW, CEREMONIAL</b> .....	54 <i>a</i>

	PAGE
LAW, CUSTOMARY— <i>see</i> Adoption I. 867ss; IV. 1066; Custom.	
LAW OF DEFENDANT .....	7
LAW, ETHICAL.....	54a
LAW, FAMILY—annexes defined duties to fixed relations .....	1101c
— does not leave them to free volition .....	1105
— basis of right to support— <i>see</i> Maintenance.	
<i>See</i> Custom, Family.	
LAW, HINDŪ— <i>see</i> HindŪ Law.	
LAW, MOSAIC .....	54a
<i>See</i> Mosaic Law.	
LAW, MUNICIPAL—its source in the religious law .....	ib.
LAW, ROMAN— <i>see</i> Adoption V. 1080 <i>f</i> ; VII. 1197 <i>d</i> , 1204 <i>e</i> ; Roman Law.	
LAW, SOCIAL .....	ib.
LAW-OFFICERS—importance of their opinions .....	2, 3, 866
their testimony with respect to the authorities of the HindŪ Law .....	10
<i>See</i> Pandits; Śāstris.	
LEGALITY OF PARTITION.....	836—844
<i>See</i> Partition.	
LEPROSY—disqualifies for performance of religious acts .....	1074
— for inheriting.....	154, 561, 579
— for partition .....	679
<i>See</i> Adoption III. 949, 998; V. 1074; Disqualification.	
LESSEE—rights of — under a member holding in severalty...	779
— from the manager not discharged by receipt from another member .....	610
<i>See</i> Tenant.	
LEVIRATE—once general in India.....	417
but now forbidden .....	418
— sprang from polyandry .....	419
— reason of its prevalence .....	876
— still practised by some Brāhmanas .....	419 <i>f</i>
in the North of India .....	423
and amongst some of the lower castes and in Orissa .....	895
— Thiyens .....	420a
in Spiti .....	ib.
in Rohtak .....	ib.
gradual disappearance of — .....	878
traces of the former prevalence of — .....	880
amongst the Jews.....	420

## PAGE

<b>LEX LOCI</b> —want of — — replaced in cases of succession by that of the person .....	4
<b>LEX VOCONIA</b> .....	464 <i>n</i>
<b>LIABILITY</b> — <b>IES</b> —on inheritance how distributed.....	746, 791
distribution of debts in partition .....	787
— includes common debts .....	746
— provision for the maintenance of rela- tions of a deceased coparcener.....	747, 791
— <b>ies</b> distributable on partition .....	746, 763
— <b>y</b> in partition for assets does not arise till they are realized .....	763 <i>b</i>
— <b>y</b> of ancestral property for debts not affected by birth of a son.....	167
— <b>y</b> of impartible zamindāri for payment of father's debts .....	163 <i>c</i>
so as to an hereditary polliam .....	167
— of the heir under a decree against the last holder .....	163
— for contribution .....	787 <i>b</i>
See Partition 791.	
<b>LIFE-INTEREST</b> —see Adoption VI. 1110; VII. 1157; Female; Stridhana; Widow.	
<b>LIMITATION</b> —under Hindū Law .....	692 <i>b</i> , 698
comparison of Roman Law.....	698 <i>n</i>
an executor may pay a barred debt .....	613 <i>f</i>
a representative not bound to plead — when- ever he can do so .....	613
barred debts may be set off against claims on an estate .....	613 <i>f</i> , 751
— does not operate on a part reserved in partition..	701
effect of — on the right to claim partition. 697, 704 <i>a</i>	
— to suit for partition under Act XIV. of 1859 .....	694
under Act IX. of 1871 .....	683 <i>n</i> , 704 <i>a</i>
under Act XV. of 1877...686 <i>b</i> , 687 <i>a</i> , 694 <i>a</i> , 698, 704 <i>a</i> ,	
1100	
in case of partition account limited to three years before suit .....	764 <i>a</i>
exclusive enjoyment for 12 years bars a suit .....	694
period of attachment by Government excluded ...	694 <i>c</i>
where property is not available for partition — does not operate except through exclusive possession subsequently .....	701

	PAGE
LIMITATION—in case of maintenance, time computed from	
refusal.....	763
—— as to Mālikana and Hakks .....	773
—— in cases of adoption .....	1100, 1236
a suit barred as to some necessary parties is	
barred as to all .....	615
though instituted by others within time.....	ib.
<i>See</i> Adoption VIII. 1236, 1237; Possession 697c.	
LIMITATION ACTS—The Indian ——— XIV. of 1859, IX. of	
1871, XV. of 1877, <i>see</i> separate List, page lxxvi.	
LIMITATIONS OF PROPERTY.....	170ss
repugnant ——— disallowed.....	182
<i>See</i> Property.	
LINGĀYATS.....	359, 416, 509
—— transformed to Vaiśyas .....	1135c
—— may adopt sister's or daughter's son.....	1028, 1037
<i>See</i> Adoption III, 952c; IV. 1028, 1042, 1051; Jangamas	567
LIS PENDENS .....	686n
LITIGATION—application of Hindū Law to ———	1
—— between Hindūs and others in the Supreme Court	
governed by Stat. XXI. Geo. III. c. 70 .....	5
LIVING APART—a sign of separation .....	687, 689, 851ss
LOCUS PENITENTIE—in adoption .....	1086
LOMBARD LAW—compared with Hindū Law.....	826, 380
LOSS OF CASTE—disqualifies for inheriting .....	154, 576, 579, 587
for partition .....	679
<i>See</i> Disqualification; Exclusion; Outcast.	
LUNACY— <i>see</i> Adoption III. 946, 953, 997, 998; Disqualification;	
Insanity 196, 579ss, 759n.	
MADNESS—disqualifies for inheritance .....	153, 576
<i>See</i> Disqualification 576; Insane.	
MAGNA CHARTA—provision in favour of infant heir as to	
debts .....	620c
preference of dower to debts .....	747n
MAHANT .....	554
—— cannot say who shall succeed his own successor.....	178f
there cannot be two existing ———s .....	559
MAHANTSHIP—succession to ———	555d
—— not disposable by way of reversion .....	555d, 559
—— obtained sometimes by wandering chelās .....	572a
<i>See</i> Gosāvis 560; Ascetic; Manager.	

	PAGE
MAHÂR CASTE .....	356, 371, 442
MAHOMEDAN RULE—effect of — on Hindû Law .....	198
MAIDEN— <i>see</i> Adoption III. ....	956, 957
succession to her stridhana... ..	501, 502
<i>See</i> Marriage; Sister; Stridhana.	
MAINTENANCE—the obligation rests according to Hindû Law on	
relationship.....	237, 248
not on contract.....	425f
but springs from jural relations of the parties. 263,	425f
——— originally contemplated only as subsistence in	
the family ( <i>see</i> below) .....	237, 256ss
——— not dependent on ancestral estate .....	244, 245, 251
a different view held by the Smṛiti Chandrikâ	
238a, 249	
modified only by property .....	238, 244, 255
the right to — is not strictly an interest in the	
estate .....	253, 259, 260, 757
———— or a charge on it .....	263
duty of — annexed to the estate wrongly taken	
250, 251	
the right to — cannot be attached.....	259, 261d
nor assigned or released.....	192, 253, 259, 262, 302a
——— of family must be provided for .....	220, 1242
discussion as to mode .....	220
head of family bound to afford — to the	
members .....	214b, 651, 758c
where primogeniture prevails junior members	
entitled to — .....	263
<i>See</i> Appanage.	
——— of wife by husband .....	590ss
claim of mother or wife to — not extinguished	
by allotment to her of a share .....	793
a wife deserting her husband not entitled to	
separate — .....	425, 592, 593
divorced woman not entitled to — .....	592, 593a
——— of dependants not to be evaded by disposal of	
property .....	640
——— of family to be provided for before alienation 648a, 1242	
gift of whole estate is subject to — .....	192, 392
wife not to be deprived of — by husband's	
alienation.....	392
nor by his devise .....	1158c



	PAGE
MAINTENANCE—children, grandchildren, widow and concubine	
entitled to — against terms of a will .....	194
purchaser with notice of widow's right to —	
bound .....	80
right and duty co-extensive with (united) family	
246—248	
including widow and daughters of pre-deceased	
son.....	246, 247, 753, 757c, 760
ruled <i>contra</i> in N. W. Provinces .....	250
———— of son's widow a claim arising from family rela-	
tion .....	758c
widow of adopted son entitled to — .....	1174
Bombay law discussed.....	758c
one member of a joint family not entitled to —	
at the hands of others.....	650
his right to — arises through disability to	
inherit.....	650, 752ss
necessary — exceeding the share of the person	
to be made up by relatives .....	579
persons excluded from inheritance and partition	
entitled to — .....	248, 578ss, 679
adopted son of one who becomes disqualified en-	
titled to — if not to a share .....	1202
———— of a widow.....	163, 780c
widow entitled to — from her husband's family	
68, 79, 192, 232, 233, 259, 653d	
but not if living apart without sufficient cause ...	592c
———— of a widow preferred by Śāstris to other claims. 747n	
but not by the Courts.....	ib.
comparison of English Law .....	ib.
widow's right to — is a personal right .....	259, 302
it is a mere inchoate right .....	192
———— usually provided for by allotment.....	758
sum may be invested to produce — .....	79
a sum given to a widow in lieu of — is at her	
disposal .....	311
widow's right to — taken away by partition. 236,	
751	
———— how satisfied .....	254, 762
———— not impaired by her with-	
drawal from the family. 261, 758	

	PAGE
<b>MAINTENANCE</b> —widow's right to — not to be reduced on account of vexatious defence	762b
———— cannot be attached or sold in execution .....	261d, 762
arrears of widow's — may be awarded.	262, 757a, 762
proper amount of — of widow .....	262g
———— may be awarded for the future .....	262, 757a
———— is subject to variation if necessary .....	262, 265, 762
decree for — of widow may be made a charge.	262, 581
separate — to widow when allowed ...	256, 261, 757
widow's right to — not subject to an agreement with her husband .....	79, 192
———— may be awarded in a suit for a share .....	264
unchaste widow not entitled to — .....	592
allowance assigned for — of widow resumable in case of unchastity .....	ib.
concubine is entitled to — 80, 164, 194, 415, 593, 653d,	753
but not out of a saranjām .....	762h
woman marrying without divorce and without first husband's consent entitled to — as concubine .....	593
son entitled to — where father holds impartible property .....	650
adult son entitled to — only in extreme want.	263, 1242
illegitimate children entitled to — .....	80, 263
————s of higher castes entitled to — ...	82
daughter entitled to — .....	68
———— withdrawing without cause not entitled to — .....	593
parents and children mutually entitled to —	263, 650, 759n
———— of father to be first provided for .....	650
———— of step-mothers .....	234
———— of sister incumbent on brother .....	245
———— till her marriage ...	437
right to — of children of deceased relatives in Punjāb .....	757c
right to — of relatives disqualified and females	752, 753
———— of wives and widows of the former .....	753

	PAGE
<b>MAINTENANCE</b> —of eunuchs .....	753a
— of lunatics, &c. ....	<i>ib.</i>
limitation for a claim to — .....	261
time computed from demand and refusal of — .....	763
<i>See</i> Adoption VII. 1165, 1166, 1167, 1174, 1180, 1204 ;	
Alienation ; Assignment ; Family ; Widow ; Wife 194.	
<b>MAJORITY</b> —general age of — now eighteen .....	80f
<i>See</i> Adoption III. 948, 961a ; VI. 1105 ; Age.	
<b>MALE</b> —s have alone full coparcenery rights.....	653
— offsprng a restraint on alienation.....	814a
—'s rights arise immediately on birth .....	655
— or adoption 1145ss	
succession to —s .....	58ss
<b>MĀLĪ CASTE</b> .....	379, 380, 526
<b>MALRĪ CASTE</b> .....	571
<b>MĀNBHĀU</b> .....	570, 571
<b>MĀNBHĀVINI</b> .....	571
<b>MANAGER</b> —joint family usually represented in external trans-	
actions by a managing member .....	609
right of — rests on the consent of the members	
609, 766	
father is naturally the — of a joint family..	609,
638	
during his life and capacity for affairs.....	609
afterwards the eldest member qualified .....	<i>ib.</i>
elder brother may take the management unless	
others dissent .....	<i>ib.</i>
widow — for an infant .....	611
<i>See</i> Minor.	
position of a — .....	609, 766
power of a — .....	170
— may discharge the religious obligation of the	
family out of its estate.....	613
— can bind the estate and family by transactions	
for the benefit of the family.....	609, 634, 637e
or with assent .....	635, 750
or for what the creditor reasonably thinks to be	
for its benefit.....	654
— may deal with the capital of family firm.....	638a
— may enter into partnership with a stranger .....	612
— may carry on family business for its benefit .....	635

	PAGE
<b>MANAGER</b> —may mortgage common property for common benefit	635
——— may incur or sell for necessities.....	611, 749
——— can pledge property for the ordinary purposes of ancestral trade .....	612
his gains and losses fall on joint estate .....	768 <i>a</i>
authority of — to acknowledge a debt .....	102, 612
——— not at liberty to pay out of the estate father's debts barred by limitation? .....	612
nor can he revive a claim against family barred by limitation? .....	612, 613
presumption in favour of his transactions .....	637
——— especially in case of a father.....	638
general liability of members for his acts (Bombay)	750 <i>a</i>
transactions with a member only supposed to be a manager acting for the common interest up- held .....	611
transactions of — bind one who consciously takes the benefit.....	609, 617, 637 <i>e</i>
lessee from — not discharged by a receipt for rent passed to him by another member .....	610
authority of — to be liberally construed. 169, 171, 634	
limitations on the authority of a — .....	611 <i>as</i> , 635
in Bombay .....	636 <i>f</i> , 638
a managing Khot has not authority to give up important rights vested in the members gene- rally.....	612
———'s act obviously prejudicial invalid .....	635
fraudulent contracts by — rescindible .....	613, 635
alienee from — bound to reasonable care and inquiry .....	635, 750 <i>a</i>
——— of minor's estate .....	634 <i>h</i>
——— bound to guard interests of infants. 620 <i>c</i>	
——— not a trustee?.....	766
powers of widow and mother as — .....	611, 612, 613
payment to mother as — held to bind the son 611, 617	
———'s liability to account limited .....	637 <i>e</i> , 763 <i>b</i>
his liability for assets does not arise before reali- zation.....	763 <i>b</i>
——— cannot claim for disbursements in excess of his proper share .....	637 <i>e</i>
——— in suits represents the whole family .....	615, 636, 750 <i>a</i>

	PAGE
MANAGER—in suits exceptionally another member perhaps may represent the whole family .....	636
——— to bind minor co-sharer in a suit must, it seems, have a certificate of administration* .....	675, 766a
decree and sale against — alone affects only his own share .....	626b, 636, 706, 707
deceased —'s interest not assets for satisfaction of a decree against him .....	628
Karnavam (or manager) of a Malabar Tarwâd ...	609d
certificate to collect debts refused to him if a debtor of the deceased.....	ib.
——— of an endowment cannot impose rules on his successor .....	202
See Administrator; Coparcener; Family, Joint; Father; Mother; Widow.	
MANASAPUTRA .....	926c
MÂNAVA DHARMAŚÂSTRA .....	30, 39
MANES OF ANCESTORS .....	1082, 1083
MANNER AND LEGALITY OF PARTITION .....	829—847
MANTRAS.....	35, 47a, 874d
MANU—see separate List of the Hindû Authorities, p. lxxvi.	
MANU SMṚITI .....	34
its age .....	46
MARÎṬHÂ CASTE .....	513, 526
MARRIAGE—is a Samskâra strongly enjoined .....	873f
——— of a girl a duty of the father .....	822
age of — .....	873f
——— is the only sacrament for a man of the servile class .....	1064b
the prevailing idea of — .....	426e
——— governed by customary law.....	90
mere apostasy does not free from the Hindû law of — .....	597a
——— is the origin of special rights and duties.....	426
——— not susceptible of a condition of nullity .....	187d
——— not prevented by insanity .....	908
——— of Hindû children is a contract made by their parents .....	ib.

\* Administrator as next friend or guardian. On this subject see *Murlidhar and Vāsudev v. Supdu and Bâkrishna*, I. L. R. 3 Bom. 149; and *Jâdow Mulji v. Chhagan Râichand*, I. L. R. 5 Bom. 306.

MARRIAGE—between persons of different castes possible only	
by caste laws.....	426d
unequal — possible according to Vīramitro-	
daya .....	82b
<i>jus connubii</i> between many pairs of castes .....	426d
laxity of — amongst Śūdras .....	425b
its ill effects the same as amongst the Romans ...	ib.
—— contract (purchase) in China .....	278n
—— of Śūdras remote from Brāhmaṇical conception...	425
—— ——— looked upon as licensed concubinage...	87
—— ——— treated with contempt .....	1035
and easily dissolved.....	423, 1035
—— not governed by Smṛiti law .....	425
—— relations amongst the wild tribes and low castes	
discussed .....	375ss
—— in some tribes not attended with change of family	284
Roman <i>matrimonium sine conventionē</i> .....	284a
prohibited degrees of — on father's side to 7th,	
on mother's to 5th .....	490b
—— with maternal uncle's daughter allowed by cus-	
tom in the Dekhan, &c. ....	868, 888
—— with sister's daughter common in the South.....	1031
—— out of the tribe entails expulsion in Punjāb .....	422b
gift and acceptance necessary to — .....	1086
higher forms of — formerly not allowed to	
Śūdras.....	86
Āsura — makes the wife only a dāsi or concu-	
bine.....	ib.
—— <i>per verba de præsenti</i> compared with the Gān-	
dharva.....	277b
forms of — as affecting succession.....	538, 540
Ārsha .....	275, 514, 517, 519
Āsura 276, 279, 280, 286, 287, 514, 517, 519, 527, 538	
Brāhma .....	514, 517, 519, 527
Daiva .....	514, 517, 519
Gāndharva .....	514, 517, 519
Kshātra .....	280e
Paiśācha .....	517
Prājāpatya .....	514, 517, 519
Rākshasa.....	280, 517, 519
Svayāṃvara .....	283
—— customs .....	279, 280, 284

	PAGE
<b>MARRIAGE</b> —is the fullest initiation .....	1061
——— initiates wife in husband's family .....	91, 129, 231
wife's legal existence is absorbed in husband's ...	92
effect of — by approved rites on the woman ...	152
by — property acquired by wife becomes her husband's .....	91
exceptions— <i>see</i> Stridhana.	
effect of — on wife's property in Germany and England .....	298e
——— ceremony cannot be dissolved by contract .....	426
effect of — between relatives or persons of different castes .....	874n
effect of omission to recite the mantras prop- erly on — .....	ib.
possibility of legal — between the adopter and the mother of the adopted necessary.....	1034
<i>See</i> Adoption IV. 1063, 1064, 1065; VII. 1163, 1186; Degrees Prohibited; Earnings; Expenditure 754n, 781; Husband; Maintenance; Remarriage; Rights, Conjugal; Wife; Widow.	
<b>MARRIAGE EXPENSES</b> — <i>see</i> Partition .....	781
——— of brothers and sisters to be provided for in parti- tion.....	781, 782, 821
the Smṛiti Chandrikā imposes the charge inde- pendently of estate .....	782c
<b>MARRIAGE PORTION</b> —provision for — — on partition.....	747, 751
daughters of deceased coparceners entitled to — — .....	501a, 753, 754
share given to a sister in a partition is only a — — .....	303
<b>MARRIAGE settlement</b> .....	392
——— of land on daughter in the Punjab.....	283b
trousseau in the S. M. Country.....	290b
<i>See</i> Marriage Portion; Palla.	
<b>MARRIED FEMALES</b> —having issue. } <i>see</i> Females. ——— without issue. }	
<b>MÂRWÂPĪ CASTE</b> .....	377, 456, 462
<b>MATERNAL AUNT</b> — <i>See</i> Aunt, Maternal.	
<b>MATERNAL AUNT'S SON</b> — <i>See</i> Aunt's (Maternal) Son.	
<b>MATERNAL UNCLE</b> — <i>See</i> Uncle, Maternal.	
<b>MATERNAL UNCLE'S SON</b> .....	133, 488, 493
——— heir to married female.....	547, 548

	PAGE
<b>MAṬHA</b> —origin of —s discussed.....	557
custom regulates matters concerning —s...	551, 557
— should pass to disciple nominated by Guru .....	556
<b>MEMONS (CUTCHI)</b> —governed by the Mahomedan Law .....	597a
but as to inheritance generally by Hindū Law ...	ib.
<b>MENTAL INCAPACITY</b> —See Father 194g, 206 ; Idiot ; Insane.	
<b>MERCHANT</b> —succession to a — .....	155, 136, 138, 139
<b>MINOR, MINORITY</b> —now ceases at 18 years by Act IX. of 1875. .	672c
— not answerable for father's debts during minor-	
ity .....	789b
— uninitiated may perform funeral rites .....	1241
but not otherwise recite Vedic formulas (Manu	
II. 172) .....	ib.
See Age.	
position of a — in partition analogous to that	
of absentee.....	673
—'s rights in partition .....	672ss
his assent to a partition is not necessary.....	673
guardian of a — cannot enforce partition	
against the will of the adult coparceners ...	674, 815
except to prevent jeopardy to the minor's	
interests .....	674
— represented by guardian in partition .....	672
— bound by such partition .....	815
—'s interests to be respected by manager and those	
dealing with him .....	635
interests of — to be protected by the sovereign.	673
the Minors' Act for Bombay is Act XX. of 1864..	672c
(See too Act IX. of 1861.)	
this not superseded by the provisions of the	
Civil Procedure Code (Act XIV. of 1882) .....	673n
whether property of a — in an undivided	
family is subject to the provisions of the Minors'	
Act (XX. of 1864) .....	673n, 674
— not generally subject to separate administration *	
any one may come forward as a next friend to	
a — .....	673c
a relative to be preferred .....	ib.
administrators of —'s estate .....	672c

\* *Kalidās Ravidat v. Prānshankar Jibhal*, Bom. H. C. P. J. 1884, p. 8.



	PAGE
MINOR—bound by guardian's beneficial transactions .....	672c
and by a suit brought by or against a legally representative member of joint family* .....	636
remedy of a — against manager .....	767
— unfairly used in a partition may repudiate it on attaining majority.....	675
<i>See Family; Father; Guardian; Manager; Representation</i>	708a
MIRÂS, MIRÂSDÂR.....	176, 177, 733a
—s could in theory reclaim their lands at any time.....	176
their present position .....	177
—s' assent formerly necessary for admission to ownership within their village .....	733a
MIRÂS TENURE—compared with customary tenancies in Eng- land .....	177a
MISREPRESENTATION—deprives consent of usual effect ...	1227, 1229
MISTAKE— <i>see</i> Ignorance .....	1226
MITÂKSHARÂ—where paramount .....	10
— is the commentary of Vijñāneśvara on Yājñā- valkya.....	12
— on payment of father's debts .....	1239ss
— on power of alienation of a paterfamilias.....	1241
<i>See Adoption passim; separate List of Hindû Authorities, lxxxvii</i>	
MITRAMISRA—the author of Viramitrodaya.....	21
MOHANT— <i>see</i> Mahant.	
MOHATÛR WIDOW .....	380
MONEY LENDING— <i>inter se</i> by coparceners conclusive of parti- tion? .....	688
MORAL DEFICIENCIES—persons labouring under — disqualified from inheriting.....	154
MORGENGABE .....	278, 279a
— confused with dower.....	279n
MORTGAGE—not sale — allowed by ancient law.....	197, 732
— accompanied by possession.....	<i>ib.</i>
— requires assent of all coparceners.....	821
except those absent and in case of emergency. 632, 731, 821	
<i>See Coparcener; Alienation.</i>	
— by son is subject to maintenance of mother and marriage expenses of sister .....	826c

\* *Gan Savant v. Nārāyan Dhond Savant*, I. L. R. 7 Bom. 467.

## PAGE

<b>MORTGAGE</b> —coparceners liable <i>inter se</i> in proportion to shares...	790
a single coparcener may redeem the whole.....	<i>ib.</i>
and hold — as security for contribution .....	<i>ib.</i>
all sharers to be served with notice .....	<i>ib.</i>
mortgagee's remedy lies against any share .....	791
a sale in execution of a decree on a — must embrace the whole interest.....	790
attachment and sale not necessary to give effect to the lien .....	628a
— by father in Madras : all sons must be joined in suit .....	627
dealings with mortgaged property .....	746a
— in Kanará .....	732n
See Kanará.	
— — — — — redeemable for ever.....	<i>ib.</i>
so (formerly) in Norway.....	734n
<b>MORTGAGEE</b> —may refuse redemption of part.....	790
— must serve all co-sharers with notice of foreclosure .....	<i>ib.</i>
— in execution must sell the mortgagor's and his own interest .....	<i>ib.</i>
See Alienation ; Mortgage 791.	
<b>MOAIC LAW</b> —mixed up things spiritual and temporal.....	55n
— compared with the Hindú Law .....	<i>ib.</i>
<b>MOTHER</b> —does not include step-mother .....	110
— never outcast to son .....	592
— preferred as guardian to father .....	355, 438
See Guardian.	
— as manager cannot alienate without necessity ...	611
— must be maintained.....	593
— is entitled to maintenance out of the family property .....	826
— 's claim to separate maintenance when allowed ...	1180a
claim of — to support not extinguished by allotment to her of a share .....	793
— whether deprived of her right to residence by a sale of the family house.....	734, 826
when inherits .....	109, 447ss, 452, 456
though separate .....	449
— postponed to father by the Vyav. May. in Gujarát .....	110, 448
— succeeds to her daughter .....	543, 544

	PAGE
MOTHER—inheriting from son takes absolutely? may not alien *	311, 312, 451
——— takes precedence over widow amongst Khojas ...	157
and by custom in Gujarât .....	99 <i>h</i> , 157, 392, 404
but not allowed to dispose of the estate .....	157
——— of a Girâsia is entitled to the Girâsi hakks by	
succession .....	448
——— postponed to son in collateral line.....	494 <i>e</i>
but not in a succession devolving through her ...	<i>ib.</i>
———'s estate .....	465
——— similar to that taken by a widow .....	110, 449, 451
devolution of property inherited by — .....	464
property inherited through — by a son once	
held to devolve in her line? .....	495
inheritance to — is rather by succession than	
survivorship .....	712 <i>n</i>
in Punjâb among some tribes property inherited	
through — excluded from partition .....	<i>ib.</i>
not so among others .....	<i>ib.</i>
See Property, Separate and Self-acquired 714.	
son regarded by Vyav. Mayûkha perhaps as hav-	
ing an unobstructed right of inheritance to his	
—'s Apâribhâshika Stridhana.....	300 <i>a</i>
but not said to be joint-owner by birth .....	711 <i>a</i>
whether such property taken by him is ancestral	714
the Mitâksharâ does not recognize a joint owner-	
ship of mother and son.....	146, 300 <i>a</i> , 711 <i>a</i>
nor does the Smṛiti Chandrikâ .....	297 <i>d</i> , 300 <i>a</i>
children cannot demand partition of —'s pro-	
perty in her life.....	824
———'s assent to partition required by several castes	653 <i>c</i> ,
660, 661 <i>a</i>	
——— cannot demand partition .....	778 <i>a</i> , 824
except as guardian for her son .....	830
——— is entitled to a share in a partition .....	778, 815, 824 <i>as</i>
———'s right to specific allotment arises when parti-	
tion is made .....	653 <i>e</i>
limitation of her share.....	654 <i>a</i>

\* The property was a Desai's vatan which, being a service holding, the Śâstri (p. 467) may have thought inalienable on that account—see "Vatan."

MOTHER—under what conditions — takes a share... 408, 653*d*, 776*b*  
 ———'s share equal to a son's in partition. 778*a*, 782, 819*d*,  
 824

share taken by — in a partition is only a means  
 of subsistence (Smp. Chand.) ..... 303, 783  
 ———'s power of disposal over share given her on par-  
 titition ..... 781*a*, 824, 1177

cannot, by adoption, divest her son's widow's  
 estate ..... 100, 984  
 remarriage of — as affecting her right of suc-  
 cession ..... 110, 453, 469

See Adoption II. 910, 930; III. 984; IV. 1066, 1067; V.  
*passim*; Stridhana.

MOTHER-IN-LAW—is the guardian of her daughter-in-law..... 407  
 direct — has preference over step — ..... 523  
 ——— postponed to her daughter-in-law as heir to her  
 son ..... 408  
 ——— succeeds to her daughter-in-law ..... 518, 522

See Adoption III. 974, 1000.

MOTHER'S COUSIN'S GRANDSON }  
 MOTHER'S FATHER'S BROTHER'S GRANDSON } —is heir according  
 to Bengal law ..... 491*b*

MOTHER'S (MATERNAL) AUNT'S SONS..... 133, 488

MOTHER'S (MATERNAL) UNCLE'S SONS..... *ib.* *ib.*

MOTHER'S (PATERNAL) AUNT'S SONS..... *ib.* *ib.*

MRITYU PATRA ..... 199

——— is a conveyance operating after grantor's death... 220

——— common under Hindû Law ..... 220, 222

——— how construed ..... 222

See Adoption VI. 1111; Will.

MUGLAI HAKKS ..... 452

See Allowance.

MUNDIUM ..... 883*n*

MUNJ—meaning of ..... 1059*n*

See Adoption IV. 1062, 1064; Upanâyana 1062.

MURALI CASTE ..... 442, 502, 522, 527*b*

NAIGAMA SECT—see Caste ..... 553

NAIKINS—see Adoption VII. .... 1214

NAIRS OR NÂYARS—see Tribes ..... 284*b*, 419*b*

polyandry amongst — ..... 284*b*

decay of polyandry amongst — ..... 426*a*

female gentileship amongst — ..... 421

	PAGE
NAIRS OR NĀYARS—women of — not allowed to marry a	
man of a lower caste .....	424d
marriage with brother's wife disallowed.....	426a
two husbands discreditable .....	<i>ib.</i>
marriage of — dissoluble at will .....	<i>ib.</i>
NAISHṬHIKA BRAHMĀCHĀRI—successor of Guru .....	500
succession to — .....	144
NAIVEDYA = food offering to gods.....	840
separate offering of — is a sign of partition ...	689
NĀNAK-SHĀHĪ SECT—see Caste .....	570
heirs to a — .....	<i>ib.</i>
NĀRADA SMṚITI .....	47
its age.....	49
NARVADĀRI HOLDINGS—sub-division of — — not allowed...	745
nor separation of the house from the holding ...	<i>ib.</i>
daughter excluded from succession to — —	
by custom in some places .....	430
NĀTRA—see Remarriage .....	463b
NEARNESS OF KIN—to a deceased rājā preferred to survivorship	74
NECESSITY—see Family .....	632, 750b, 821
NEGATIVE ELEMENT—of combined will the stronger .....	608b
NEPHEW—(father deceased) and uncle have equal rights on parti-	
tion .....	74, 75
— represents his father in undivided family .....	351
— when — succeeds .....	111, 112, 459, 474
— s take <i>per capita</i> .....	459, 461
— preferred to half-brothers by Vyav. May. ....	458b
— when excluded by surviving uncles .....	111, 457
— excludes a son's widow .....	459a
— succeeds to his aunt.....	545
— to be preferred by widow in adoption .....	1025
— s held to be sufficiently represented by their uncle	616
— sister's son preferred to maternal aunt's son .....	491b
— postponed to cousin.....	474
— — sister .....	494
<i>contra</i> in Madras .....	494c
— to samānodaka.....	487
See Adoption II. 898; Bhāchā.	
NEPHEW'S DAUGHTER—not an heir in Bengal .....	499
NEXT FRIEND OF INFANT—any one may come forward as — ...	673c
a relative preferred .....	<i>ib.</i>
See Minor.	
NIBANDHA—ranked as immoveable property.....	174d, 772d

	PAGE
NIBANḌHA—whether of necessity “immoveable property” in statutes .....	774 <sub>n</sub>
widow excluded from succession to — by Bṛi- haspati .....	270
NIECE—takes a share with her brother? .....	459
sister's daughter not an heir .....	476
See Adoption IV. 1031; Brother's Daughter 497.	
NIECE'S GRANDSON—his succession .....	497
NIECE'S SON—his succession .....	ib.
See Adoption IV. 1031.	
ṆĪLAKAṆṬHA—is the author of Vyav. May. ....	19
life of — .....	20
NIMBĀDITYA .....	572
NIRDHANA—meaning of — .....	271
NIṆAYASINDHU—authority of — .....	11
———— is the work of Kamalākara.....	23
See separate List of Hindū Authorities, lxxxvi.	
NITYA ADOPTION—see Adoption VI. ....	1143
NIYOGA—in Orissa.....	550 <sub>a</sub>
———— makes the Kshetrāja legitimate.....	ib.
NOMINATION—of a successor to a Guru.....	555
NOTICE—doctrine of — .....	8 <sub>a</sub>
———— binding taker of property .....	189
———— of foreclosure .....	610 <sub>n</sub>
See Adoption III, 956; VI. 1122; Ignorance; Mortgage; Registration.	
NULLITY—see Instrument.....	641
NUNCUPATIVE WILL—see Will .....	668, 813
NUPTIAL GIFT—constitutes separate property .....	340, 724, 851
NUZZARĀNĀ—usually taken by Hindū rulers for recognizing an adoption .....	937 <sub>n</sub>
NYĀYĀDHĪSH.....	241
OBLATIONS—funeral — .....	19, 62
performance of — important .....	66
See Funeral Ceremony; Inheritance 62; Śrāddha.	
OBLIGATION—a Brāhmaṇa is born under three —s .....	872, 919
merely religious —s will not be enforced by Civil Courts .....	903
————s of the father pass to the heir.....	80, 1240
———— to pay father's debts is a part of the inheritance.	163
———— for debts dependent on taking property .....	80 <sub>f</sub>
limited by Act VII. of 1866 .....	ib.

	PAGE
OBLIGATION—to pay father's debts does not extend to those of other members .....	195
father's securities bind sons unless they are for profligate purposes .....	77
assignment of —s .....	745a
See Adoption III. 974, 975; VII. ; Debts; Father; Promise 195, 206.	
OBSEQUIES—see Adoption VI. 1126, 1127; VII. 1160, 1161, 1166; Funeral Ceremony.	
OCCUPANCY—see Prescription.	
OCCUPATION—of waste is under Hindû Law a natural right .....	172
mere — does not confer ownership (Mit.) .....	379
OFFICE—see Eldership; Hereditary Office 784; Vatan 745.	
OFFSPRING—of concubine entitled to support .....	80
——— (Śúdra) of a casual connexion inherits if recognized .....	83
OPPRESSION—of debtors under British and Native rule .....	786f
ORÂONS—see Tribes .....	281n
ORDEAL, KOSHA .....	769
ORDERS—see Āśramas .....	64
ORGAN—defect of, a cause of disqualification .....	126, 153, 576
ORISSA .....	550n, 863
ORNAMENTS—commonly worn by a woman not subject to partition .....	208, 734, 735a
unless given in fraud of coparceners .....	208, 735
——— given for ordinary wear are Strīdhana .....	208, 310a
license to use — on particular occasions not a gift of them .....	186, 294f
——— of courtesans exempt from seizure .....	885n
——— given to concubine inherited by her husband....	515
or her patron? .....	ib.
See Gift; Jewels; Partition.	
ORPHAN—See Adoption II. 894e, 930g; V. 1073.	
OTTI MORTGAGE .....	285
UDICH BRĀHMAṆAS .....	1213
OUTCASTE—sons born before father's expulsion are not —	154b, 585
but subsequently born share his expulsion...	154b, 585
———'s daughters are not expelled .....	154b, 585
———s and their children are disqualified from inheriting .....	154, 576, 579, 587
——— doctrine does not apply to families sprung from sons .....	154b

	PAGE
OUTCASTE—See Adoption II. 907, 908; III. 946; IV. 1066; Disqualification; Exclusion; Maintenance.	
OWNERSHIP—origin of —	171
— is a matter of secular cognizance	ib.
law of — discussed by commentators at an early period	241
in what — consists	188
possession necessary to the completion of —	111a
— constituted by right of exclusive use	319a
complete — in the taker is the general prin- ciple of Hindû Law	711n
power of alienation not essential to —	319a, 321a
comparison of European laws	319a
— under Hindû Law not lost by absence	732
nor without owner's will	172, 649
subject to public law	188
restrictions still recognized in the North of India	176b
— arising from possession	697
— of the transferee cannot be greater than that of the transferor	7
— of village communities over common lands	732n
tribal — of lands the source of individual	138a, 732n
tribal — not found in Bombay Presidency	422
— unobstructed	333c
— obstructed	334
— collective in Malabar	656d
See Adoption VII. 1149, 1150; Gift; Possession; Property; Sale.	
PAISÎCHA MARRIAGE	517, 519
See Marriage.	
PAKSHA CEREMONIES	1147f
the Jains have no —	901k
PÂLAK KANYÂ = quasi adopted or foster daughter	925c, 1016
— may be discarded	933a
PÂLAKA PUTRA	925, 926n, 1015, 1144, 1212
See Foster Son.	
PALLA	297, 513
provision must be made for —	392
in Gujarât — resumed on widow's remarriage.	418a
PANDITS (or SÂSTRIS)—opinions of —	2



	PAGE
PAṆDITS (or ŚĪSTRIS)—testimony of — .....	10
<i>See</i> Adoption I. 866; IV. 1063; VI. 1089.	
PARADEŚI—meaning of — .....	811b
<i>See</i> Caste.	
PARAPHERNALIA .....	181d
PARĪSARA SMṚITI .....	47, 56
PARCENER— <i>See</i> Coparcener; Illegitimate Son 4; Partition.	
PARENT—to act with anxious care in giving a son .....	932
———s entitled to maintenance .....	263
order of ——s' succession .....	448
comparison of Salic Law .....	448b
<i>See</i> Adoption <i>passim</i> ; Father; Gift 778b, 807a; Guardian;	
Inheritance; Maintenance; Mother; Partition.	
PARENTS' SAPINDAS—succession of — to Strīdhana. 152, 517ss, 543	
PARIBHĀṢIKA STRĪDHANA—according to the Mitāksharā no dis-	
tinction between — and other kinds of	
Strīdhana .....	146, 297
succession to — — according to Vyav. May. 146	
PARĪT CASTE .....	449
PARTIES TO SUITS—all members of joint family must join as	
plaintiffs.....	608a
one in possession before institution of suit is a	
necessary party.....	686a
<i>See</i> Family; Father; Manager; Representation; Suit.	
PARTITION—defined .....	597, 599
Vijñāneśvara's definition defective.....	600
——— is regarded by the Civil Law as a kind of exchange. 597	
——— is a particular kind of intention.....	195, 841
in — there is a break of continuity of the	
person and familia .....	67a
separate enjoyment for convenience does not	
constitute — .....	693, 779
——— how a source of property .....	60, 67
division of the subject of — .....	600
will to effect — .....	690
——— favourably viewed by Hindū Law.....	673b
family is the basis of the law of — .....	598
——— governed by usage .....	7
<i>See</i> Custom; Usage.	
——— according to caste laws .....	659ss
son's right to claim — derived from his co-	
ownership .....	714a

	PAGE
<b>PARTITION</b> —requires consent of all members (Mároomakata- yam) .....	735d
<i>Complete and Partial.</i>	
son's right to — denied by many castes ...	659, 660
in Bengal son cannot obtain — .....	163
— of self-acquired property when allowed.....	657, 658
— of ancestral property held by father at will of son .....	171, 657, 796
— confined to descendants of a common ancestor ...	654
— claimable by grandson after father's death ...	658, 801
— extends to the fourth in descent from the com- mon ancestor if present .....	672, 828b
— not claimable by a grandson during life of his father against the father's will * .....	698b
— deferred till delivery of pregnant widow of de- ceased coparcener.....	75, 657, 847
right to — confined to demandant .....	665
— cannot take place between husband and wife... ..	91
— between co-widows .....	103
females cannot demand — .....	677
otherwise in Bengal .....	678
mother cannot enforce — .....	778a
when a guardian may claim — on behalf of the minor .....	674, 830
a co-sharer practising fraud does not lose his share .....	680
<i>See Fraud.</i>	
persons disqualified to inherit not entitled to —	679
— may be enforced by purchaser of undivided share	705, 708
in such a case effect to be given to the particular transaction.....	705
<i>See Coparcener.</i>	
coparcener must claim — of his whole share...	699

\* The rules presume an estate descended to the father or taken by him in partition, not a mere right which he may assert, as before partition. In the latter he cannot be superseded by his sons. See Mit. Ch. I. Sec. II. para. 6; Sec. V. para. 3 and *note*; and Yajñ. II. 117, 120, 121. The Smṛiti rule as to the share claimable by a son after his father's death is extended to the case of a claim made by the son on his father after the father's separation but no further.

	PAGE
<b>PARTITION—final — re-opened for one excluded as outcast on</b>	
his expiation .....	58a
in — the presumption is of all property held	
by coparceners being joint.....	708
—— possible without property .....	840
part reserved is divisible .....	702
—— of lands redeemed may be enforced after a	
previous — .....	684
property omitted through inadvertence subject	
to —.....	702, 735, 833
comparison of Roman Law.....	702
—— of lands subject to public service.....	263
—— of a vritti how made .....	730c
+ woman's jewels excluded from — ... ..	207, 310a
also reasonable gifts from father to son .....	778b, 807
—— and to a wife or daughter...	208
—— is to be made of property as actually subsisting	
without allowance for previous inequalities of	
expenditure .....	763, 835, 836
unless there has been dishonesty .....	764d, 835
—— of liabilities on inheritance.....	746, 763
valid incumbrances to be deducted .....	748n
—— of debts and other liabilities .....	786, 791
marriage expenses of unmarried members to be	
provided for .....	781
—— regulated by the nature of the property as divi-	
sible or not.....	770
—— in specie not essential .....	682, 703
—— of divisible property how made .....	770
—— of naturally indivisible property .....	784, 831
in — of Bhāgdhāri and Narvadāri no sub-divi-	
sion allowed .....	745
—— may be made with reference to property itself	
impartible .....	740
—— in case of partible and impartible	
property of one family .....	264, 740
compensation for impartible property taken by	
one sharer .....	735
comparison of English Law .....	735d
—— may be postponed during a life-estate.....	682, 843
—— or a mortgage .....	684, 701
—— not constituted by mere arithmetical determina-	
tion of share .....	682, 685a, 691a, 694

	PAGE
PARTITION—not constituted by taking profits in shares .....	693, 694
but is by a limitation of rights to particular parts	
without actual distribution.....	703
not constituted by agreement to divide lands still	
to be recovered.....	684
——— effectual though not by metes and bounds...	682 <sub>n</sub> , 841
——— determination of shares on —— .....	763
——— limited to coparceners in existence .....	75, 792
<i>Equal and Unequal.</i>	
in ancestral property father's and each son's	
shares are equal .....	770
according to Bombay High Court —— as to all	
self-acquired property uncontrolled .....	771, 772
in spontaneous —— of self-acquired property the	
head may reserve a double share .....	770
he takes an equal share if —— is enforced ...	770, 771
father to distribute equitably .....	771
—— not bound to equality by custom .....	772 <sub>c</sub>
——— between brothers must be equal.....	778, 806
——— collaterals <i>per stirpes</i> .....	778
rights arising from sole possession of a portion	
by a coparcener.....	<i>ib.</i>
compensation in such a case .....	779
contrary ruling.....	<i>ib.</i>
comparison of English law .....	779 <sub>f</sub>
——— in case of a house built by a member out of his	
separate funds .....	779
<i>See Possession.</i>	
in —— between reunited coparceners the shares	
are equal.....	783
mother in a —— takes an equal share .....	778 <sub>a</sub>
——— with an only son a moiety .....	<i>ib.</i>
——— by division of profits .....	786
distribution of acquisitions by different par-	
ceners proportionate to contributions .....	725 <sub>a</sub>
unequal —— not now recognized .....	771, 807, 820
——— except by consent .....	844
——— of unequal gains must be equal.....	728 <sub>e</sub>
<i>partial</i> —— not provided for in the Hindû Law	
Books.....	700
——— not claimable.....	661, 699, 841 <sub>b</sub>
——— effected only by consent	661, 699, 744, 785

	PAGE
PARTITION—among sons cannot be effected against their will	195, 665
<i>Method of</i> —	
in — no account of past transactions is to be	
taken ...	778
except from the time that — is wrongly refused	778d
deduction from share for prodigal expenses .....	786
partial distribution brought to account in a	
fresh general — .....	778
against the branch previously benefited..	659
rights and duties arising on — .....	763
——— duly claimed gives a right to account from that	
time .....	764a, 769a
in the case of enforced — complete accounts	
must be taken from time of demand .....	764
but not generally any further back .....	765b, 767
——— account how taken .....	769
in a suit for — all the coparceners must be	
before the Court .....	764
computation in case of one member's separation.	763, 764
if detrimental Court can refuse — .....	676
under English Law the Court regards all equitable	
rights .....	678n
decree for — effects a severance .....	663, 683
—— not a suit without a decree .....	842
effect of decree suspended by appeal .....	663, 842b
decree for — of estate paying revenue to be	
executed by Collector .....	794
<i>Incidents of</i> —	
repugnant conditions cannot be annexed to estates	
taken on — .....	ib.
the right to — cannot be annulled by an agreement	
never to divide certain property.*	
trade partnership constituted by agreement	
in — .....	690d
signs of implied will to effect —.....	687, 848—856
——— may be proved like any other fact .....	848
incompleteness of — must be proved by those	
who assert it .....	702, 703a

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\* *Rámalinga Khánápure v. Virupákshi Khánápure*, I. L. R. 7 Bom. 538.

**PARTITION—Consequences of—**

once made is final .....	702, 703 <sub>n</sub> , 834, 837, 838
does not make members strangers .....	231, 238
does not close all claims of father and son in case of pauperism .....	793
does not deprive son of the right of inheritance.	359, 793
son born after — sole heir to parent's share ...	355
of newly discovered property .....	833, 834
of a courtyard advisedly retained for common use refused.....	830
so when division would prevent proper use .....	832
consequences of partial — .....	778
partial — separates the family as to the part divided.....	699, 701 <sub>b</sub>
but no further .....	702
inchoate — does not alter the rights of copar- ceners .....	683
rights of tenants of united family after — .....	717 <sub>e</sub>
evidence of—see Burden of Proof; Evidence; Pre- sumption .....	687, 692
limitation now affects some cases of — .....	828
exclusive possession for 30 years bars an action for further — .....	696
mortgaged property redeemed by one member and held by him exclusively for 20 years is lia- ble to — .....	694

See Adoption II. 935<sub>n</sub>; III. 1009<sub>n</sub>; VII. 1189, 1190; VIII. 1225; Charges; Coparceners; Debts; Disqualification; Distribution; Division; Elder; Endowments; Expenditure 835, 836; Family; Father; Female; Fraud; Furniture 730; Grandson; Grant; Idol; Illegitimate; Indigence; Maintenance; Mother; Ownership; Patrimony; Property; Widow.

**PARTNER—s'** relations distinguished from those of a joint family. 598<sub>a</sub>

in business when inherits to a Banya ... 135, 136, 138

**PARTNERSHIP**—joint family converted into — see Partition ... 690<sub>d</sub>

**PĀSHANĀDAS** .....

Jains are — .....

See Caste.

**PASTURE GROUND**—see Grant; Inām.

**PATERNAL AUNT**—see Aunt, Paternal.

	PAGE
PÂTILKĪ VATAN— <i>see</i> Vatan.	
PATITA—what actions make a man — .....	558
——— may inherit after penance .....	58a
PÂT MARRIAGE—is legal by Act XV. of 1856 .....	414
——— of a widow allowed among Śūdras .....	423
children of — — generally legitimate. 387, 388,	413
<i>See</i> Remarriage ; Patnī.	
PÂT WIFE—said to have the same rights as a lagna wife .....	<i>ib.</i>
——— during first husband's life-time without divorce	
is but a concubine .....	415
<i>See</i> Pât Marriage.	
PATNĪ—meaning of — .....	88b
who is and who is not a — .....	93
——— alone entitled to allotment, according to Smṛiti	
Chandrikā .....	88b
wife other than — entitled to maintenance only	88b, 93
——— alone has a right of inheritance according to the	
Śāstra .....	86, 93, 258, 421
PATNĪ BHĀGA—origin of — .....	285, 422, 819
——— prevalent in the Panjāb and in Madras .....	422
——— not now recognised elsewhere .....	819
PATRIA POTESTAS—under the Hindū Law .....	213, 288, 666
Roman — <i>see</i> Adoption VI. 1086n ; Father ; Stri-	
dhana.	
——— extreme formerly.....	281, 288
——— gradually limited .....	<i>ib. ib.</i>
PATRIMONY—once inalienable .. ..	197
causes of this.....	197a
——— recovered by father is separate property.....	720
unless recovered with aid of ancestral estate.....	723
mother's assent required to partition of — in	
some castes .....	660
father's assent required in many castes .....	<i>ib.</i>
——— according to the Smṛitis not divisible .....	732a
<i>See</i> Inheritance ; Partition ; Property 733.	
PATṬADHIKĀRĪ = head of a Maṭha .....	568
PAUNARBHAVA = son of a Paunarbhū .....	652b
PAUPER— <i>See</i> Adoption V. 1075 ; Indigence ; Maintenance ;	
Partition.....	793
PENAL CODE, THE INDIAN— <i>see</i> Adultery.	

	PAGE
PENANCE—questions on —	11
— treated of in Yājñavalkya	13
— in case of adultery	424, 593, 885
— fornication	424
— an out-caste	590
<i>See</i> Disqualification 58a.	
PENSION	180
— substituted for a saranjām must support junior members	742
— not attachable	775n
<i>See</i> Nibandha ; Property.	
PERMISSION— <i>see</i> Adoption <i>passim</i> ; Sanction.	
PERPETUITY—rule against — under English law rests on public policy	200a
— in favour of private persons disallowed	184, 216n, 260, 668n
— even under the form of a religious trust	203h
— in favour of an idol or charity	185
<i>See</i> Endowment ; Trust.	
— grants of land in — not incompetent because rāj impartible	398
— obstacle to — in the presidency towns	226
— not in the mofussil	ib.
PERSONAL INHERITANCE—(English Law)	773
PERSONAL LAW—governs duties	7
PERSONAL PROPERTY—(English Law)	773
— in stocks and shares	775
PER STIRPES— <i>see</i> Partition.	
PHALAVIBHĀGA = division of produce	786, 849
<i>See</i> Partition.	
PIGNORIS CAPIO	762b
PILGRIMAGE—not recognized as a cause for alienation	322
— expenses of a — not awarded to a widow as against her brother-in-law	761a
PIOUS ACTS—are indivisible	831
PITRIDVIT = Enemy of Father— <i>see</i> Enemy of Father	583
PLACE OF ADOPTION	1118
<i>See</i> Adoption VI. 1123.	
PLACE OF WORSHIP AND SACRIFICE—indivisible	784
POLITY	19
POLLUTION—arising from death ; duration of —	950d
— as affecting adoptive father and son— <i>see</i> Adoption III. 950 ; VII.	1160



	PAGE
POLYANDRY .....	284
— in Kamaun.....	289a
— still subsists in Cochin and Travancore .....	284
and amongst many of the aborigines of India.....	419
such as Tothiyars.....	419h
— amongst the Nâyars.....	ib.
and in Seorâj, Lahoul, Spiti .....	ib.
fraternal — amongst the Thiyens .....	ib.
and Khâsias .....	289a
— reduced to biandry .....	284
its effects on inheritance.....	ib.
transition to the ordinary system.....	285
— connected with niyoga.....	289
— in Sparta.....	289a
POLYGAMY—is referred to in the Vedas .....	879c
POSSESSION—its effect under Hindû Law .....	692b
adverse and permissive — discussed ...	687a, 693, 696, 704a
partial — extended to the whole when right- fully taken .....	1213b
separate — of part of joint estate.....	634b, 778
— by the mortgagee is acquired by a <i>bond fide</i> attornment of the mortgagor .....	696n
— not always given to a cultivator .....	696
— by Collector to protect revenue not adverse to real owner .....	704a
— in common by joint family .....	675, 697
— by co-sharer; its nature .....	633
Roman and English Law compared with the Hindû Law .....	633d
— by one joint tenant is — by all .....	697
unless distinctly exclusive .....	ib.
exclusive — constitutes separation.....	633, 697
<i>See below.</i>	
— — necessary to bar co-parceners	694, 695n, 696, 697e, 704a
mere non-enjoyment not equivalent to exclusion .	704a
change of — when dispensed with.....	179n, 1213
— — generally essential to change of ownership .....	218, 221, 695b
comparison of Roman Law.....	695b
— not necessary to validate gift to son .....	686n, 811
change of — replaced by registration .....	685e

	PAGE
<b>POSSESSION</b> —exception to change of — being replaced .....	685c
— may be dispensed with when the deed is incon-	
trovertible?.....	1213b
separate — a sign of partition.....	688a, 692, 695
— once held essential to partition .....	841
— as to ownership of separate share ...	111a
— perfecting title may be acquired notwithstand-	
ing an irregularity in taking it. ....	696n
— giving by a single co-sharer to purchaser protected	633
exclusive — by a single co-sharer raises a pre-	
sumption of its being his share in a past par-	
tition.....	633c, 695
— acquired <i>pendente lite</i> is subject to the deci-	
sion.....	686
— before suit makes possessor a necessary	
party .....	<i>ib.</i>
— is the strongest proof of ownership .....	172
— as a title prevails until a better is shown .....	695b
title by — arises concurrently with extinc-	
tion of the right to sue .....	697
long — by a member with consent of other	
sharers gives him a right to retain the parti-	
cular portion in partition .....	779
— by several in succession must be connected by	
lawful derivation to give a prescriptive title	
to the last .....	704a
— acquired permissively or by tenancy does not	
become adverse by mere non-payment of rent	
for 12 years .....	696n
— by the mortgagee after payment is not necessa-	
rily adverse .....	<i>ib.</i>
suits for —.....	<i>ib.</i>
— refused to co-sharers excluded by one? .....	633c
<i>See Coparcener ; Gift ; Limitation ; Notice ; Partition ; Pre-</i>	
<i>sumption ; Property ; Registration ; Sale.</i>	
<b>POSSESSORY ACTIONS</b> .....	696
— jurisdiction.....	<i>ib.</i>
<b>POSTHUMOUS SON</b> —obtains a share after partition .....	703
<i>See Adoption VII, 1150 ; Son 792.</i>	
<b>POVERTY QUALIFICATION</b> — <i>see Adoption V. 1075 ; Daughter</i>	
<i>(above, p. 1308).</i>	
<b>PRABHU</b> — <i>See Adoption III. 952c ; IV. 1029 ; Caste</i> .....	521

	PAGE
PRAJĀPATI—declares patrimony impartible— <i>see</i> Inheritance 271; Property A ; Patrimony.	
PRĀJĀPATYA MARRIAGE.....	514, 517, 519
<i>See</i> Marriage.	
PRECEDENCE—of begotten son over adopted son .....	1186, 1187
<i>See</i> Adoption III. 955 <i>n</i> ; VII, 1187 ; Eldership ; Primogeniture.	
PRECEPTOR—of a Brāhmaṇa, when inherits .....	137, 481, 496, 500
———— inherits to a Naishṭhika Brahmāchārī .....	144, 500
PRE-EMPTION—arises from former impartibility of patrimony ...	731
right of — may be exercised by a widow taking by inheritance .....	313 <i>n</i>
PREFERENCE—in adoption by a widow, rule of — .....	1025
PREGNANCY—of widow postpones partition .....	657
<i>See</i> Adoption III. 945, 1011 ; Partition.	
PREPARED FOOD—indivisible .....	831
PREScription—under the Hindū Law .....	695 <i>b</i> , 698 <i>n</i>
comparison of Roman Law .....	698 <i>n</i>
———— under the Bombay Regulation V. of 1827.....	697
———— does not arise where successive possessions are unlawful.....	704 <i>a</i>
<i>See</i> Limitation ; Possession ; Ownership.	
PRESENT—from a friend is separate property .....	340
———— to a woman ; succession to — .....	514
<i>See</i> Strīdhana.	
PRESIDENCY TOWN—residence in — does not of itself subject a Hindū to English Law .....	3
testamentary law in ———— <i>See</i> Will.	
PRESUMPTION—of union of a Hindū family .....	708
———— of joint estate .....	688, 708, 720, 724 <i>b</i> , 729 <i>a</i>
this is easily overcome .....	729 <i>a</i>
———— in favour of joint acquisitions in united family .....	78, 709, 720, 724 <i>b</i>
circumstances may rebut it .....	78
———— in case of separate acquisitions asserted and de- nied .....	729 <i>a</i>
———— of separate acquisition from conveyances in a single name and long enjoyment .....	724 <i>b</i>
———— of partition from separate possession .....	694, 685
———— quiescent enjoyment of part. .....	681, 697
———— of allotment in partition against him who long holds a part of an estate exclusively.....	633 <i>c</i>
———— of death when arises ..	676

	PAGE
<b>PRESUMPTION</b> —in a benami transaction .....	722
— of acquiescence of co-sharers when lessee continues to hold under lease from a divided member .....	779
— of a debt contracted by the manager of a united family being joint.....	749
— in favour of widow's dealings approved by heirs .	1217
— in favour of adoption .....	1094ss
— against the gift of only or eldest son except as <i>dry&amp;mushyâyana</i> .....	1209b
<i>See Adoption IV., VI ; Burden of Proof; Evidence.</i>	
<b>PRIEST</b> —s fees and duties of — .....	398, 411
— inherit from <i>Yajamâna</i> .....	714
— widow may succeed to emoluments by custom ...	411
— she appointing an officiator.....	<i>ib.</i>
— an intruder may be sued.....	<i>ib.</i>
<i>See Property, Sacred.</i>	
<b>PRIMOGENITURE</b> —origin of — .....	914
— under English Law .....	60
— in ancient Hindû Law .....	69
— was a right of headship rather than ownership..	737
— connected with impartibility .....	735e
— instance of succession under rule of — .....	70n
— junior son by birth entitled to precedence over elder son by adoption .....	935g
— provision for younger brother where — prevails.....	263
— traces of — still preserved .....	736a
— contests as to — in India and Europe.....	<i>ib.</i>
<i>See Adoption II. 95n ; Appanage ; Brother ; Custom ; Eldership ; Precedence ; Râj.</i>	
<b>PRINCIPALITY</b> —ruled usually by a single line of Chieftains .....	735
— various modes of succession to — .....	736
<b>PRITIDATTA</b> —is the affectionate gift of the husband ...	146, 268, 519
<i>See Stridhana.</i>	
<b>PRIVITY</b> —connects successive possessions .....	704a
<b>PRIVY</b> —is indivisible .....	832
<b>PROBATE</b> —granted to adopted son.....	1233
— of a will in the <i>Mofussil</i> needless .....	226, 668n
<i>See Adoption VIII. 1233 ; Wills 225, 226.</i>	
<b>PROCEDURE</b> —Hindû .....	239
<b>PROCEEDINGS</b> —legal .....	24
<i>See Adoption VIII ; Limitation ; Suit.</i>	

	PAGE
PROCREATION—by deputy was common in ancient times .....	882 <sub>n</sub>
——— on a Śūdra a ground of expulsion .....	424 <sub>h</sub>
PRODIGAL— <i>see</i> Expenditure 786 <sub>n</sub> ; Father; Interdiction.	
PRODIGAL EXPENDITURE—deduction for — .....	786
<i>See</i> Coparcener; Partition.	
PRODIGALITY OF FATHER—a cause of rescission by son.....	194 <sub>g</sub>
<i>See</i> Prodigal; Burden of Proof.	
PROFITS— <i>see</i> Rents and Profits; Partition.....	693, 694
PROHIBITION— <i>see</i> Adoption III. ....	968, 969
PROHIBITIVE WILL—prevails over active in a combination .....	608
PROFLIGACY— <i>see</i> Alienation; Debts; Interdiction; Partition; Prodigal.	
PROMISE—s are sacred .....	189, 256, 295, 747 <sub>n</sub>
———s now create only a moral not legal obligation...195, 206	
property promised morally inalienable .....	206
gratuitous —s generally void.....	193
——— made by the father binding on the sons .....	161, 747 <sub>n</sub>
——— to wife if reasonable binds sons.....	208
fulfilment of — postponed to maintenance of family .....	1242
<i>See</i> Adoption III. 952; Father; Son..	
PROPERTY—	
A. ITS CHARACTERISTICS UNDER HINDŪ LAW.	
nature of — under HindŪ Law .....	173
power of sale not a necessary incident of — *	
local sacrifices held a consecration for the benefit of the first occupants .....	197
——— allodial rather than feudal .....	173
——— takes its characteristics from the family law.....	237
they are not qualities inherent in the land, &c. ...	<i>ib.</i>
——— referred to religions connexion by the ancient law	55
——— connected with family sacra.....	66 <sub>n</sub> , 587, 752 <sub>a</sub> , 1082
rights of — under the Brâhmaṇical system connected with spiritual union .....	636
possession of — essential to an effective sacri- fice .....	62
partition attending dispersion of sacra .....	731 <sub>d</sub>
——— as viewed by HindŪ Law is in itself capable of alienation ( <i>Smr. Chand.</i> ).....	170 <sub>b</sub>
sale of land once disallowed .....	197, 732

---

\* *See* Bo. Gov. Sel. No. 114, p. 6, para. 12.

\* See Bom. Gov. Rec. No. 114. At p. 5 is an instance of the village changing the seat of cultivation triennially, which illustrates Tac. Germ. 26. See too 5th Rep. 723:

	PAGE
PROPERTY—religious gift usually inalienable .....	197
—— limited to a corporation or family.....	200, 202
limitations unrecognized by the law are refused effect by the Courts * .....	181
See Dedication; Endowment; Custom; Grant; Inâm; Jâgir.	
B. SOURCES OF PROPERTY.	
right to — acquired by occupancy .....	379
inheritance and partition how sources of — 60, 67, 600	
See Endowment; Gift; Grant; Inâm; Inheritance; Limitation; Occupation; Ownership; Partition; Possession; Prescription; Reversioner.	
C. JURAL RELATIONS CONNECTED WITH PROPERTY GENERALLY.	
I. <i>Resting on Volition of Owner.</i>	
a. <i>Transfer and Creation of Rights by act inter vivos.</i>	
—— generally alienable .....	1706
illegal restriction on a coparcener's dealing with his share disallowed.....	718
personal — = self-acquired .....	1242
the right to give it away .....	648a, 772, 1242
—— self-acquired and separate may be given or be- queathed .....	139, 182, 477, 772
or otherwise disposed of by the owner.....	193
interests unknown to the law cannot be created..	ib.
See Abeyance; Alienation; Coparcener; Gift; Mortgage; Partition; Perpetuity; Purchase; Sale; Trust.	
β. <i>Disposal by Will.</i>	
See Bequest; Dedication; Devise; Endowment; Gift; Testamentary Power; Trust; Will.	
II. <i>Descent and Disposal governed by Law.</i>	
a. <i>Under the Law of Inheritance.</i>	
—— is inherited for religious benefits .....	587, 716e
—— taken as a "universitas" .....	162
ancestral — descends in direct male line with its accretions.....	709

---

\* *Kumar Tarakeswar Roy v. Kumar Soshi Shikharewar*, L. R. 10 I. A. 51.

	PAGE
<b>PROPERTY</b> —descent of ancestral — obstructed and unobstructed .....	63
See Bandhu; Daughter; Dāya; Descent; Devolution; Father; Female; Gotraja Sapinda; Grandson; Inheritance; Mother; Perpetuity; Sapinda; Son; Stridhana; Succession; Widow.	
β. <i>Under the Law of Partition.</i>	
why land and dwelling house were considered indivisible .....	731, 732, 785
endeavours to preserve — — in the laws of the various countries .....	733
self-acquired — when mixed with ancestral — becomes ancestral — .....	710
a grant of land in charity, if not for particular purpose, is divisible — .....	817
ancestral — partible at will of father .....	657
distribution of ancestral — once allowed merely for use.....	731d
consequences of this.....	ib.
See Brother; Coparcener; Debt; Distribution; Eldership; Family; Father; Mother; Nephew; Obligation; Presumption; Primogeniture; Sister; Son; Stridhana; Widow; Wife.	
γ. <i>Under the Law of Adoption.</i>	
See Adoption VII, VIII; Son; Widow.	
III. <i>Liabilities annexed to Property or attending interests therein.</i>	
burdens on — .....	160, 245, 746
—— not hypothecated for father's debts .....	77
yet is assets for payment of debts in the hands of the heir .....	169, 193, 194, 716
zamindārī descended from father is liable to pay his debts.....	81
—— even self-acquired, not alienable so as to deprive family of maintenance.....	648, 1242
attachment of impartible — for debts discussed .....	161
—— of family estate.....	649
provision for concubine a charge on — .....	164
See Appanage; Charge; Creditor; Daughter; Debt; Disqualification; Family; Father; Female; Maintenance; Manager; Mortgage; Purchaser; Reversioner 96a; Sister; Widow; Wife.	



## PROPERTY—D. CLASSES OF PROPERTY.

I. *According to Natural Character.*a. *Immoveable Property.*

- what is immoveable — under Hindû Law?  
 question discussed ..... 772d  
 immoveable — in legislation..... 773ss  
 immoveable — includes a hakk ..... ib.  
 and arrears ? ..... ib.  
 ————— may include property purchased  
 with capital or profits of  
 ancestral moveable ..... 709b  
 immoveable — does not include an annuity from  
 Government land revenue ..... 773  
 but one to a temple out of extra assessments held  
 a charge on ———— ..... ib.  
 ————— regarded as inalienable except with  
 assent of family ? ..... 648  
 ————— not disposable by owner ?..... 772, 813  
 power of disposition supported by a Śâstri..... 814  
 and allowed by the High Court of Bombay..... 772  
 naturally indivisible — how disposed of ...829—832  
 immoveable — not to be aliened so as to reduce  
 family to indigence ..... 604, 758c, 1242  
 a compound is divisible — under ordinary  
 circumstances ..... 832  
 restrictions on widow's disposal of ———— ..... 777  
*See Alienation ; Stridhana ; Widow ; below β.*

a. a. *Moveable Property.*

- not identical with "personal property"  
 under English Law ..... 773  
 ————— disposable by owner..... 812, 813  
 widow's power to dispose of ———— ..... 777  
*See Personal Property ; Stridhana ; Widow.*

β. *Incorporeal Property.*

- Nibandha declared immoveable ..... 174d  
 ————— includes a religious fund ..... 785n  
*See Hakk 772 ; Nibandha 174d, 773 ; Pension ;  
 Saranjâm.*

γ. *Indivisible or Impartible Property ; see below D. II.*

- indivisible — described ..... 728  
 legally ———— described ..... 735  
 ————— ; kinds enumerated .....730, 784, 831

	PAGE
<b>PROPERTY</b> —legally indivisible, so to be disposed of in partition	
as to secure maximum of advantage to	
all coparceners .....	784
_____ may be sold and proceeds distributed or	
equitably adjusted by agreement .....	734, 785, 831
impartibility not a reason for exoneration from	
debts .....	163
D. II. <i>According to purposes served.</i>	
a. <i>Sacred Property.</i>	
sacred — .....	138a, 185, 197, 202, 554
_____ dedicated to an idol .....	160
_____ — confined to priestly family...	411
sacred — inalienable under most religious	
systems .....	185b
comparison of Roman Law .....	ib.
_____ — subject to special limitations as to inherit-	
ance, partition, and alienation .....	817
temple allowances are hereditary and divisible,	
(subject to special customs) in some cases .....	742
trust property partible subject to trust .....	ib.
a widow may enjoy — — appointing a sub-	
stitute .....	411
intruder subject to a suit .....	ib.
_____ under the Roman Law .....	817a
<i>See Alienation; Ascetic; Custom; Dedication;</i>	
<i>Division; Endowment; Gift; Gosāvi; Grant;</i>	
<i>Idol; Krishnārpana; Mahant; Perpetuity; Śro-</i>	
<i>triyam; Temple; Trust; Vṛitti.</i>	
β. <i>Charities and Public Dedications.</i>	
_____ DEDICATED—is a trust .....	160
_____ generally inalienable .....	ib.
<i>See Charity; Dharma; Grant; Trust; Will.</i>	
γ. <i>Political Tenures.</i>	
_____ IMPARTIBLE—on account of political condition ...	735
_____ may be joint.....	740
_____ includes a pension commuted for a	
resumed saranjām.....	650
_____ may form part of family estate.....	740
_____ and be taken into account in partition	ib.
_____ not necessarily inalienable .....	741d
seniority by birth gives superiority of	
title to — .....	78, 79

	PAGE
PROPERTY, IMPARTIBLE—is inherited by the nearest male members in preference to daughters	740
claim to a rāj as being — — — refuted by enjoyment opposed to impartibility .....	741d
the Tarwad's — — — in Malabar .....	656d
See Grant; Jāgir; Rāj; Saranjām; Zamindār.	
<i>§ Official Tenures.</i>	
vatan is divisible — .....	844, 845
a vatan — impartible, held not to have become partible by cessation of official functions.....	742
See Hereditary Office; Joshi; Vatan.	
D. III. According to Relations of the Persons interested.	
a. As Members of a Family.	
a. In equal Relations.	
1. 1. Ancestral Joint Property.	
———— ANCESTRAL—described .....	709, 711, 718, 720, 723
joint — regarded by Hindū Law as an attribute of common origin .....	598
———— implies concurrence of rights over the aggregate .....	ib.
———— depends on indivision of family .....	599
comparison of Roman and French Laws .....	597b
a joint trade is joint — .....	340
———— acquired by use of patrimony is joint — ...	709, 720
———— purchased out of the income of ancestral — is itself ancestral .....	723
immovable — acquired by means of ancestral moveable — ranks as ancestral immovable — .....	709b, 723, 724
———— acquired through instruction at the family expense is joint — .....	341
———— self-acquired does not rank as joint where acquirer received only sustenance and elementary education from family .....	729
———— acquired while acquirer was drawing an income from family is joint — .....	727
JOINT — causes absorption of interest on death without male issue .....	598
the whole property of each member presumed to be joint — .....	708, 720, 724b, 729a
See Family; Presumption.	

	PAGE
<b>PROPERTY, ANCESTRAL</b> —gift to united brethren without discrimination is joint — .....	653b, 709
—— becomes ancestral as soon as it devolves undisposed of on descendants .....	710
ancestral — co-extensive with objects of unobstructed inheritance.....	711
father and son have equal ownership in ancestral — .....	363, 390, 585, 713, 723, 796, 798
whether ancestral — is alienable by father for purpose, not illegal or immoral .....	618, 619
joint — inalienable by co-sharer under the Mitāksharā.....	1242
gift of immoveable ancestral — allowed by Mitāksharā to a separated parcener .....	478
—— may be joint though impartible.....	740
indivision excludes several ownership according to Dāya Bhāga .....	766
conditions under which partition may be claimed .....	657
—— ancestral, partible at will of son united with father, head of a family .....	ib.
—— after partition retains its character between the parcener and his sons .....	715, 717
comparison of English Law .....	717e
share taken on partition is ancestral — to the branch taking it .....	717
undivided — not answerable for separate debts .....	79
—— includes property mortgaged but not recovered .....	684
—— recovered by one of several sons .....	69, 797
immoveable — mortgaged by the father and sold in execution subject to son's claim for partition 694n; comp.....	618, 622, 642
effect of a single parcener's sale.....	688a
father has no exclusive right in — — devolving on him by brother's death P .....	710
See Coparcener; Eldership; Partition; Possession; Residence 702; Sale; Savings 158; Widow 315.	
a. 1. 2. <i>Separate and Self-acquired Property.</i>	
—— <b>SEPARATE AND SELF-ACQUIRED</b> —defined 340, 341, 721, 724, 728	

	PAGE
PROPERTY, SEPARATE AND SELF-ACQUIRED—is of two sorts .....	721
———— as between father and son .....	ib.
———— as between coparceners .....	724
———— independently acquired ranks as separate estate.	78,
	725b
undivided members may have — — .....	716e
separate — includes: property inherited from	
females, brothers, collaterals, or great-great-	
grandfather .....	710, 711, 723
nature of property thus taken discussed.....	711ss
inherited in any right other than lineal inherit-	
ance through males is self-acquired — P...715,	722
separate — includes: property sold, which a	
coparcener repurchases out of	
his own means .....	719
———— savings and accumulations by	
junior members out of their	
allotments in a zamindâri 158,	743
———— gains of science without aid of	
patrimony .....	724
———— a reward for extraordinary	
achievement .....	725b
———— gains of valour without aid of	
patrimony .....	724
———— gains of chance.....	ib.
———— nuptial gifts .....	851
———— present from friends .....	ib.
———— grant of village .....	721
———— bequests .....	227, 228
———— property recovered from stran-	
ger holding adversely to	
family of acquirer .....	719
———— ancestral property recovered by	
father .....	718, 722
the recovery being through his	
own ability .....	718, 723
mother's estate is not — — P .....	711a, 714
zamindâri inherited through mother not — ...	714
———— received from father-in-law or maternal grand-	
father is — — (in Dera Gazi Khan)... 712b,	724b
———— of half-caste received from his European father is	
self-acquired .....	227

	PAGE
PROPERTY—property renounced in favour of younger sons is	
their separate — .....	717c
source of fund employed determines if property	
is separate or otherwise .....	728
property divided is treated as separate — of	
the member as against separated members ...	717
the acquirer has absolute power of disposal over	
separate — .....	477
presumption that — is self-acquired from long	
enjoyment and separate dealings .....	724b
unequal distribution of separate — is admissible,	
though opposed to commentaries 208ss, 648, 772, 812	
separate — may be given or willed to wife to	
the exclusion of sons ? .....	806, 835
contrary opinion of the Hindû authorities 807ss, 834,	
1107	
especially as to immoveables .....	648a, 810, 814a
See above D. I. a.	
he may give her even ancestral separate — to a	
moderate extent .....	207
when son, grandson, or great-grandson can de-	
mand share in separate — .....	658, 795, 796, 803
——— acquired by different parceners how to be distri-	
buted .....	725b, 734
presumptions which arise in such cases, see Bur-	
den of Proof; Presumption.	
See Adoption VII; Alienation; Coparcener; Dis-	
tribution; Father; Mother; Testamentary	
Power .....	103ss, 667
1. 3. <i>Recovered Property.</i>	
meaning of “recovered” — .....	720, 797
nature of — — — .....	719
——— recovered by father when ranks as self-acquired	
718, 722	
and when as ancestral .....	722
ancestral — recovered without the aid of the	
patrimony becomes separate — .....	720, 725b
ancestral — recovered by another coparcener	
with the aid of patrimony is ancestral — ...	718
subject to deduction of one-fourth for the ac-	
quirer .....	ib.
——— ——— looked on jealously by custom though	
approved by the Sâstras .....	764

	PAGE
<b>PROPERTY—</b> <i>a. 2. In Subordinate Relations.</i>	
gift of ancestral immoveable — restricted by Śāstri in case of a married man .....	477
and his testamentary power .....	1158c
nuptial gifts are separate — .....	340, 724, 851
property acquired by a woman usually her husband's .....	91
<i>See</i> Adoption VII.; Concubine; Daughter; Female; Illegitimate Son; Marriage; Sister; Widow; Wife.	
<i>β. As members of Communities and Corporations.</i>	
— transferred by a mahant by breach of trust can be recovered .....	188f
<i>See</i> Bhāgdāri 431, 745; Endowment; Maṭha.	
<i>γ. As members of Castes and Classes.</i>	
<i>See</i> Brāhmanas; Mahārs.	
<i>δ. Co-Ownership; Co-Possession; Co-Responsibility.</i>	
<i>See</i> Coparcener; Family; Manager; Ownership; Representation; Possession; Suit.	
— ANCESTRAL— <i>see</i> above D. III. and the references.	
— Divisible— <i>see</i> Property A; C. II. <i>β</i> ; D. I. <i>γ</i> ; D. II. <i>a</i> ; D. III. <i>a</i> . I. 2, and the references.	
— Immoveable— <i>see</i> Property D. I. <i>a</i> . I. 1, 1. 2; Alienation.	
— Impartible or Indivisible.— <i>see</i> Property D. I. <i>γ</i> ; C. II. <i>β</i> ; D. II. <i>γ</i> ; D. III. <i>γ</i> , and the references.	
— Inalienable— <i>see</i> Property A. D. II. <i>a</i> , and the references.	
— Religious or Sacred.— <i>see</i> Property D. I. <i>β</i> ; II <i>a</i> , and the references.	
— Self-acquired or Separate— <i>see</i> Property D. III. <i>a</i> , 1. 2; Alienation; Debt; Inheritance; Partition; Presumption.	
PROSTITUTION—property acquired by — belongs to the husband.....	516
PUBERTY— <i>see</i> Adoption II. 930 <i>g</i> ; III. 998; Age.	
PUJARI = worshipper .....	555
PUBLIC POLICY .....	188, 189
PUNARBHŪ .....	386, 652, 882
son of a — regarded as illegitimate .....	388
— legitimized by Act XV. of 1856.....	387
<i>See</i> Pāt; Remarriage 387, 388.	
PUPIL—when inherits .....	137

	PAGE
PUPIL—when inherits to a Sannyâsi .....	144, 499
<i>See</i> Disciple ; Guru ; Student.	
PURCHASE—by a coparcener is presumed to be on the joint ac-	
count .....	709
— of son disallowed .....	894
— of children by dancing women once common.....	933a
— by Gosâvîs of disciples.....	933
<i>See</i> Adoption II.	
— of wife disapproved, <i>see</i> Wife .....	273, 376
PURCHASER—for value favoured .....	192
— of family property ; his responsibilities .....	622, 635
— from father or manager bound to inquiry .....	641
— in good faith from a widow exonerated .....	101
— with notice of widow's claim .....	80
— without ————— .....	<i>ib.</i>
— of an undivided interest, becomes a tenant in	
common with other co-sharers ...	606, 631, 632, 707
— not entitled to any particular portion of the	
estate .....	606, 631, 705
— has to work out his right by partition	606, 631, 705,
706, 707, 785	
— must join all the members as defendants. ....	706
— on partition may be allowed the particular por-	
tion so far as justice allows.....	705
— cannot be put into possession .....	664, 707
but in possession allowed a joint possession with	
other co-sharers.....	633, 664, 707
— will not be ousted.....	633
— not affected by subsequent partition to which he	
was not a party.....	632
— under decree against a co parcener must sue for	
partition .....	637
contrary rule as to a father in Madras.....	<i>ib.</i>
PURĪ CASTE .....	565
<i>See</i> Gosâvîs.	
PURUHITA .....	180
PURUHITS.....	200, 243n
PUT—escaped by a single adoption.....	1148
PUTRA—in the Smritis does not strictly include an adopted	
son.....	896n
<i>See</i> Son.	
PUTRESHTI— <i>see</i> Adoption VI. ....	1082, 1124, 1126
176 H	



	PAGE
<b>POTRIKĀ-PUTRA</b> .....	445, 890, 893
two senses of — .....	888d
— not enumerated by Manu .....	894b, 1067b
but named separately .....	ib.
— was ranked above Kshetrāja .....	753c
— placed on the same footing as aurasa .....	1067b
sister's daughter or son cannot be — .....	1053
the daughter herself might be called — and perform obsequies.....	1067b
— not recognized at the present day.....	894
<i>See</i> Adoption II. 877; IV. 1027; Appointment 890.	
<b>POTRIKĀ-SUTA</b> .....	84, 87
<b>QUASI-ADOPTION</b> — <i>see</i> Adoption .....	1068
<b>QUASI-GOTRASHIP</b> —amongst the lower castes .....	929e
<b>QUIT-RENT</b> .....	697
<b>RĀJ</b> —may exist for purposes of property without special political status .....	739
inheritance to such a — resembles that to a principality.....	ib.
succession to — .....	70, 157, 738
— compared with European system ...	735e
illegitimate son excluded from — .....	152
— regranted before adoption to widow.....	1152
<i>See</i> Custom; Descent; Devolution; Eldership; Principality; Property II.	
<b>RĀJĀH</b> — <i>see</i> Adoption VI. ....	1122
<b>RAJPUT CASTE</b> .....	384, 458
<b>RĀKSHASA MARRIAGE</b> .....	517, 519
<i>See</i> Marriage.	
<b>RĀMĀNANDA</b> .....	572
<b>RAMAVAT CASTE</b> .....	574
<b>RANGĀRI CASTE</b> .....	359
<b>RATIFICATION</b> —no — of that which is not done on account of the principal .....	368, 1175
— requires knowledge .....	1229
— of a lease made by widow .....	102g, 368
— by conduct of son of payment of mortgage to his mother .....	612
— in cases of adoption .....	1099
<i>See</i> Acquiescence; Adoption VI. 1105; VII. 1175; Estoppel; Relation 1219f; Widow.	
<b>RATIONALIST</b> —ranks as an Atheist .....	869

	PAGE
<b>RĀVALNĀTHA</b> .....	527b
<b>RE-APPEARANCE</b> — <i>See</i> Absence; Absentee.	
<b>REASON OF LAW</b> —when consulted.....	674, 676, 691, 725, 767, 845
<i>See</i> Interpretation.	
<b>REASONABLE INQUIRY</b> — <i>see</i> Purchaser; Manager; Minor; Creditor.	
<b>RECORDS</b> — <i>see</i> Authentication .....	1101
<b>REGISTRATION</b> —cases of — referred to .....	695b
case of gift discussed .....	685c
effect of — .....	189, 190, 191
———— as notice.....	190
———— omission to register.....	ib.
———— replacing possession for transfer of ownership ...	685
partition deed for Rs. 100 and more to be regis- tered .....	680f
but partition otherwise proveable.....	ib.
<i>See</i> Adoption VI. 1138; VIII. 1220.	
<b>REGULATIONS</b> — <i>see</i> separate List, p. lxxvii.	
<b>RELATION</b> —(term of English Law)—cannot validate an act void for want of power .....	964, 1219
the invalidity of an adoption is not cured by a supervening state of things in which it would have been valid .....	1014d
<b>RELATIONS</b> — <i>see</i> Kinsmen.	
<b>RELATIONSHIP</b> —full blood — counterbalances reunion .....	23f
remote — .....	242
———— not recognized in ancient times.....	242a
analogies of European Law.....	243n
———— of the adopted son dependent on the Samskâras. 938, 1203	
<i>See</i> Adoption IV.	
<b>RELATIVES</b> —provision for — at the time of partition .....	747, 1202
blood — of wife— <i>see</i> Adoption IV. ....	1033
<i>See</i> Inheritance; Kinsmen; Maintenance; Partition.	
<b>RELIGION</b> —as determining personal law .....	4
<b>RELIGIOUS CEREMONIES</b> — <i>see</i> Ceremonies.	
<b>RELIGIOUS COMMUNITY</b> .....	551, 554
<i>See</i> Custom; Property.	
<b>RELIGIOUS ENDOWMENT</b> — <i>see</i> Endowment.	
<b>RELIGIOUS SERVICES</b> .....	554
<b>RELINQUISHMENT</b> —of a share, recognized .....	827, 838
———— induced by fraud is not binding .....	839
———— by son— <i>see</i> Son .....	340, 792

	PAGE
RELINQUISHMENT—by widow— <i>see</i> Widow.....	96, 100
<i>See</i> Adoption VII. 938; 1173.	
REMAINDER—only to a person in existence .....	179
estate by way of — ..	1159
not to be governed by English Law.....	97, 98.
REMARRIAGE—of widows in higher castes void by Hindû Law.	413
of widows disallowed by Hindû Law except under caste custom .....	386ss, 417, 425, 447
valid amongst Śûdras.....	423
divests widow's estate .....	591
in some castes on — by widow, payment must be made to the family and sometimes to the caste.	418a
in some castes widow on — has to give up all her first husband's property except pritidatta...	417
does not prevent inheritance from son by first husband .....	458
offspring of a woman by — formerly considered illegitimate.....	387
son by — now legitimate .....	413
legalized by Act XV. of 1856...360, 387, 389, 413, 425, 447, 453	
a woman remarried without divorce deemed a concubine .....	593
such — a penal offence .....	ib.
<i>See</i> Adoption III. 999; Pâṭ Marriage; Widow.	
RENTS AND PROFITS—receipt of — — separately not con- clusive of partition.....	693, 786
division of — — is a recognized mode of par- tition.....	694, 786, 829, 849
of a Vataudârî village .....	786
RENUNCIATION—by an elder brother gives estate to a younger	457, 717c
of adoption not allowed .....	1153
of marriage on payment of a fine.....	423
———— disallowed .....	424
<i>See</i> Adoption VII. ; Relinquishment.	
REPARTITION—when — may be claimed .....	703, 839
not generally claimable.....	834, 837
exceptions .....	832
variation in value does not give a right to claim ———— .....	837
<i>See</i> Partition.	

	PAGE
<b>REPRESENTATION</b> (= Declaration)—inducing change of position	
must be made good .....	189, 1230
—— (for inheritance) by descendants .....	65
sons and grandsons take by — .....	72
female — not generally recognized .....	470
rule as to — not affected by residence abroad.	73
extent of — .....	344, 652, 672
law of — extends to remote relations .....	74
failure of three intermediate links bars the right of — .....	73, 344
—— can be claimed up to seventh degree .....	73
—— said not to extend to collaterals .....	453, 459
grandsons take by — when mother dies be- tween death of grandfather and actual partition	111
nature of this succession discussed .....	711 <i>n</i>
limits of — by descendants .....	654
—— not recognized in heirship to a deceased bro- ther .....	111
—— of family by father .....	707, 708
<i>See</i> Father.	
—— exception under circumstances in favour of in- fant sons.....	708 <i>a</i>
—— of family by father as defendant .....	617 <i>e</i>
—— of father by adopted son in partition .....	935 <i>c</i>
<i>See</i> Adoption VII; Family; Manager; Possession.	
—— of joint family in suits.....	615
<i>See</i> Suit 1179.	
representative character ascribed to father or coparcener sued .....	611, 620 <i>ss</i> , 629, 636
in other cases denied .....	626 <i>ss</i>
<i>See</i> Suit.	
<b>REPUDIATION</b> — <i>see</i> Wife .....	593 <i>b</i>
<b>REPUGNANT PROVISIONS</b> —void .....	671, 718, 721
<b>RESERVE</b> — <i>see</i> Adoption VI. 1107, 1109, 1114; VII. ....	1157
<b>RES SACRÆ</b> .....	185
<i>See</i> Sacra; Property, Sacred.	
<b>RES JUDICATA</b> —binds the same parties, though a different portion of the property was the object of the former suit .....	1234
—— binds when the decision bore on the same jur- relation .....	1235 <i>a</i>

	PAGE
RES JUDICATA—instance of — — maintained, though erroneous .....	722b
See Adoption VIII. 1234.	
RESIDENCE—as affecting the law to which subject .....	3
—— abroad does not affect representation .....	73
—— daughter entitled to — .....	68
—— of the widow should be in the family dwelling 68, 79, 252, 255, 734, 826, 853	
—— enforced by caste laws as a condition of maintenance.....	257a
—— in husband's family a duty not now enforced .....	256, 260
widow cannot be deprived of her right by a sale 79, 252, 345, 734	
comparison of custom of London .....	734b
widow's occupation is notice of the right.....	826b
purchaser with notice of widow's right to — bound 252	
separate — when allowed .....	257
See Adoption VI. 1123; VII. 1164, 1180; Maintenance; Widow.	
RESIDUE, UNDIVIDED—succession to — — how regulated ...	702
RESIGNATION—see Relinquishment; Renunciation.	
RESPONSES—importance of — of law officers.....	3
See Adoption I. 866; V. 1073.	
RESTRICTION—see Transfer.....	721b
RESUMPTION—of grants by native rulers .....	398
—— of land by Government gives right to a parcer- ner, deprived of it, to claim contribution from others.....	840
RETROSPECTIVE EFFECT OF ADOPTION ... 368, 982, 993as, 1149as, 1175	
REUNION—with whom possible.....	140, 656
—— how effected .....	140
effect of — .....	ib.
original status restored .....	143
—— according to the Viramitrodaya .....	144
See Family 656b.	
REUNITED COPARCENER—succession to —.....	140
—— s when succeed .....	141
—— sons take their father's estate .....	140, 141
in preference to sons still separate .....	ib.
See Inheritance; Reunion 140.	
REUNITED FAMILY—see Family, Reunited.	

	PAGE
<b>REVERSIONER</b> (= expectant heir)—has no vested interest during widow's life.....	89, 94d
—— cannot generally obtain a declaration of his title during widow's life .....	96, 391
but may in case of an attempted alienation.*	
—— may protect the estate against improper alienation or waste.....	97
—— cannot question alienation in which he concurred .....	778n
what — can sue the widow.....	97
—— when bound by a decree against the widow .....	96a
interest of — is not liable to attachment and sale .....	98, 190c, 314
<b>REVOCATION</b> —see Adoption VI. 1086; Gift.	
<b>RIGHTS</b> —beyond the pale of religious connexion not recognized by ancient laws.....	55n
creation of — only in favour of a person in existence .....	185
—— of widows restricted in Bengal .....	1078
—— of maintenance cannot be assigned by a widow .....	192, 253, 259, 262, 302
proprietary — acquired by occupancy .....	379
restoration of conjugal — when refused .....	91c
See Birth; Inheritance; Property; Wife.	
<b>rites and ceremonies of adoption</b> —see Adoption VI. <i>passim</i> .	
<b>RIVAL WIFE</b> —see Wife.	
<b>ROADS</b> —common — when indivisible.....	730
—— may be used by all coparceners.....	784
<b>ROMAN LAW</b> —compared with Hindû Law...185b, 194d, 214, 218, 242a, 277b, 282n, 284a, 297e, 319a, 441, 463b, 575a, 585a, 610c, 629c, 630n, 649e, 698n, 703a, 724b, 817a, 893a, 905d, 916a, 925c, 928a, 929d, 930g, 931a, 932c, 933a, 936a, 1080f, 1155c	
<b>ROTATION</b> —proceeds of hereditary office to be enjoyed by — .....	784, 817
an inâṁ village, indivisible, may be enjoyed by .....	829
property dedicated to family idol to be enjoyed by — .....	830
places of worship and sacrifices are indivisible and to be enjoyed by — .....	784, 817

\* See *Iari Dutt Koer v. Muset. Hansbutti Koerain*, L. R. 10 I. A. 150.



	PAGE
<b>SALE</b> —formerly had to take the shape of gift .....	192, 198
delivery and acceptance necessary for a — .....	192
— of land still unrecognized in some districts .....	733
consent of townsmen or co-mirásdârs formerly required .....	ib.
— of family lands not a process of Hindû Law for enforcing payment of debts .....	649
— made for common liability causes a deduction from common property.....	668
— of son in extreme need, <i>see</i> Adoption .....	1074, 1075
— and gift of a child forbidden by Âpastamba .....	876 <i>d</i>
— of children recognized amongst the Romans .....	893 <i>a</i>
— of expectant interest of doubtful validity .....	190 <i>e</i>
— in execution of a father's interest does not pass son's..	636 <i>f</i>
— of a single co-parcener's interest extends to it only...	ib.
effect given to — by partition .....	ib.
purchaser at a Court — can only seek for partition	707 <i>e</i>
— acquires only the judgment debtor's right to claim a severance of his share* .....	663
<i>See</i> Adoption VII. 1177; Alienation; Co-parcener; Father; Purchaser; Widow.	
<b>SALE IN EXECUTION</b> —rights of enjoyment of otherwise indivi- sible property ( <i>e. g.</i> well or tank) are transfer- rable in execution .....	832
<b>SALIC LAW</b> —compared with Hindû Law .....	88 <i>a</i> , 448
<b>SALVATION</b> —may be attained by asceticism .....	905 <i>a</i>
<i>See</i> Adoption II. 872, 875, 901, 902, 921, 1082, 1103; Ascetic.	
<b>SALVEE CASTE</b> .....	751 <i>d</i>
<b>SAMÂNAGOTRA</b> —the same as gotraja .....	129
— means belonging to the same family .....	ib.
<b>SAMÂNODAKAS</b> —who are — .....	132, 133
meaning of — .....	133
— gotraja, when succeed .....	133, 486
— cease with the fourteenth degree.....	ib. ib.
— not mentioned in the Mitâksharâ as heirs to a woman's property .....	537
<b>SAMBANDHA</b> .....	58
<b>SAMÂRA</b> = moral and ceremonial duties .....	647 <i>b</i>

\* *Baboo Hurdey Narain Sahu v. Baboo Booden Perakash Mitter*, Pr. Co. 5, Dec. 1883.



	PAGE
SAMSKÂRA * = the initiatory rites (Manu II. 26ss, 39, 67, 169, 170)	553
neglected by Gosâvis .....	553
Munja or Upanâyana (Manu II. 169).	
See Initiation.	
performance of — as affecting status .....	938b
adoption, <i>see</i> Adoption II. 938b, 1148 ; VII. 1160, 1165 ; Ceremonies ; Initiation ; Marriage.	
SAMSKÂRAKAUSTUBHA—of Anantadeva .....	24, 862
See separate List of Hindû Authorities, p. lxxvi.	
SAMSRISHTI—succession to a — .....	140
SAMVARTÂ SMṚITI .....	47
SANCTION—of grantor deemed necessary to adoption of an heir to the holding of grantee .....	937*
See Adoption III. 955, 956, 958, 961, 972, 994, 987.	
ŚANKEARA—was the father of Nilakanṭha .....	20
— author of Dvaitanirṇaya.....	<i>ib.</i>
ŚANKARÂCHÂRYA .....	552
SANNYÂSI .....	59, 65
who may become —s .....	552e
Śûdras and women cannot become —s.....	553
duties of a — .....	<i>ib.</i>
succession to a — .....	144, 499
custom governs succession to —s.....	554
See Adoption III. 952 ; Ascetic 551ss.	
SÂNTHÂLS— <i>see</i> under Tribes.....	281
SAPIṆḌA—s described .....	120
who are —s .....	122, 123
interpretation of — according to Bâlabhāṭṭa. ....	128
— relationship based on descent from common ancestor .....	120
not on presentation of funeral oblations .....	122
— — — in the case of females on marriage with descendants of a common ancestor.....	<i>ib.</i>
when — — ceases.....	121, 543*
bhinnagotra — same as bandhu .....	133
who are bhinnagotra —s .....	137

\* An account of the Samskâras now practised will be found in B. S. V. N. Mandlik's Vyav. May. Introd. pp. xxx ss.

	PAGE
SAPINĢA—paternal aunt pronounced not a gotraja — but a bandhu ? .....	131b
contra.....	131
—— relationship through females restricted to four degrees .....	137
——s of the husband when inherit .....	153, 520
——s of the widow when inherit.....	153
gotraja — .....	463ss
who are —s .....	517
Kamalākara's rule of determining nearness of ——s .....	518
sagotra —s of the husband when succeed to the widow .....	520
bhinnagotra —s when succeed to the widow ...	537
—— of the widow, inherit to her .....	540
sagotra —s of widow, succession of.....	543
See Adoption VI. 1122.	
bhinnagotra — .....	547
duty of — as to adoption .....	864, 881c, 975c
son of — — preferred for adoption.....	887, 1037
See Adoption III. 976, 1000ss; VI. 1109a, 1117; VII. 1196; Kinsmen.	
SAPINĢA'S SUCCESSION.....	481, 482
See Gotraja Sapinġa.	
SAFRATIBANDHA DĀYA SUCCESSION—see Succession, Obstructed.	
SARANJĀM—is usually impartible.....	173, 742, 745n
holder of a — can make a grant for his own life	721n
—— is attended with an obligation to maintain the younger members.....	742
pension substituted for — has the same legal character .....	ib.
succession to a — is according to primogeni- ture .....	745n
grant to a lady out of — resumable after death of grantor .....	762
SARANJĀMDĀR—consent of Government thought necessary to choice by — in adoption .....	1076
SAROGĒES—see Adoption III. 997; IV. ....	1031
ŚĀSTRIS .....	3
importance of their opinions .....	866
reason of some inconsistencies in their answers .....	425, 866c
ŚĀTĀTĀPA (VRIDDHA) SMṚITI .....	51

	PAGE
SAUDĀYIKA—woman's control over ——— absolute .....	92, 266
————— limited by the Smṛiti	
Chandrikā .....	299
SAVINGS—out of part of zamindārī allotted to a junior member	
are not joint property .....	159
——— made by a widow—see Widow .....	315
——— of a widow out of the estate inherited from her	
husband are accretions to it unless distinctly	
appropriated otherwise.*	
——— out of allotments to juniors not joint property ...	743
See Accumulations ; Stridhana.	
SAXON LAW—as to pious gifts compared with Hindū Law .....	192c
SCHOOLS—ancient, origin of ——— .....	33
——— Brāhminical, origin of intellectual life in India...	53
SCIENCE—see Gains 725 ; Partition.	
SEBAITS—see Mahant ; Property D. II ; Suit.	
SECOND ADOPTION—see Adoption III. ....	244
SECTARIANS—fabrications of ——— .....	53
SECURITIES—created by father bind sons unless of a profligate	
character .....	77
SEISIN—once essential to gift of land under English Law.....	219a
See Possession.	
SELF-ACQUIRED = in any way acquired except by succession,	
descent and participation of rights .....	714
SELF-ACQUIRED PROPERTY—as between father and son .....	721
——— between co-parceners generally.....	724
See Property, Separate and Self-acquired.	
SELF-GIVEN—see Adoption II. and III.	
SENIORITY—in origin postponed to nearness in blood.....	70
——— by birth gives superiority of right.....	78, 79
——— where property is impartible ..	78
See Eldership 736 ; Primogeniture.	
SEPARATE PROPERTY.....	77ss, 721ss
See Property, Separate and Self-acquired.	
SEPARATED HOUSEHOLDER—becomes the origin of a new line of	
succession .....	77
——— free to dispose of ancestral estate in	
the absence of sons .....	15.
heirs to a ——— .....	73
See Father ; Inheritance ; Partition ; Property ; Separation ;	
Son.	

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\* *Ieri Dut Koer v. Musst. Hansbutti Kaertin*, L. B. 10 I. A. 150.

	PAGE
<b>SEPARATION</b> —defined .....	656
— how effected .....	<i>ib.</i>
— signs of — .....	436, 687, 689, 697
— cannot be prevented by creditors .....	657
— times of — .....	<i>ib.</i>
— may be made at any time on terms agreed to.....	659
— at the will of a son .....	657
— of the father from his father and brothers does not involve — of the father and his son .....	355
sons born after — preferred to sons separated as heirs to their parents' share .....	68, 355
— does not deprive a son of inheritance .....	357
<i>See</i> Adoption VII. 1172; Commensality; Evidence; Partition; Sacrifice; Son 776.	
<b>SERVICE-LAND</b> —aliened or divided freed from special rule of descent .....	744
<b>SERVICES, RELIGIOUS</b> —secure future beatitude .....	1082
<b>SETTLEMENT</b> —of land made with holder binds owner.....	722
<i>See</i> Widow 1229.	
<b>SET OFF</b> —of barred debts against claimants on a fund ...	613f
<b>SEX</b> — <i>see</i> Female.	
<b>SEXUAL ASSOCIATIONS</b> —in the lower castes.....	375, 417ss
— in ancient times .....	878, 881
<b>SHARE ALLOTTED TO FEMALES</b> —nature of the property .....	780, 783
<i>See</i> Adoption VII. ; Daughter ; Father ; Mother ; Partition ; Sister ; Stridhana ; Widow.	
<b>SHISHYA</b> .....	560
<b>ŚIMPI (Tailor) CASTE</b> — <i>see</i> Caste.....	516, 1136
<b>SIPUJ</b> .....	569
<b>SIRPĪVA</b> — <i>see</i> Allowances.	
<b>SISSEE ĀBOES</b> — <i>see</i> Tribes .....	289
<b>SISTER</b> —entitled to maintenance.....	232, 248, 437, 753
—'s provision in undivided family extends to a quarter share	351
<i>See</i> below.	
—'s maintenance and marriage a charge on brother's estate .....	782c
indigent widowed —s entitled to provision in some castes .....	754n, 757c
— to provision from brother's widows.	755
— is a gotraja .....	131
not so according to Smṛiti Chandrikā.....	471

	PAGE
SISTER—in Gujarāt is first of the gotraja sapinḍas .....	114, 117
— in Madras regarded as a bandhu, but postponed to sister's son.....	494e
— 's succession .....	463ss, 494e
— perhaps a trace of female gentileship ...	422c
position of full — .....	463
— competent to inherit in Western India .....	127a
exclusion of — by custom .....	463
her right admitted by Bālabhaṭṭa.....	130c
— is analogous to that of brothers .....	ib.
—s take equally .....	464
— succeeds before remote kinsmen.....	458, 464
— preferred to a paternal first cousin .....	464
— in Bombay and Gujarāt precedes half-brother 112, 458, 464, 465, 468	
— placed next to the grandmother by Nīlakaṇṭha.....	115, 117
— postponed to gotraja sapinḍas by Viṣṇāneśvara 114, 115	
— ex. gr. to the widow of the paternal uncle	131, 132
—'s succession to a sister.....	502
— succeeds to her brother by adoption as by birth. ....	923a
half — preferred to step-mother .....	469
See Half-Sister .....	465
in some passages allowed an equal share with brothers	677c
— takes absolutely by inheritance .....	296, 328
property inherited by — is Strīdhana (in Bombay)	465
— is entitled on partition to a share equal to one- fourth of a brother's .....	437, 782
—'s share in a partition is her absolute property .....	782
— is only a marriage portion? (Smṛiti Chandrikā).....	303
contra the Vīramitrodaya .....	ib.
—'s Śulka inherited by her full brothers .....	277ss, 327, 519d
See Adoption IV. 1034; VII. 1189, 1197.	
SISTER'S DAUGHTER.....	498
—'s right of inheritance admitted by Bālabhaṭṭa .	130c
— succeeds to a woman .....	548
— postponed to sister's son.....	494
— pronounced not an heir .....	476
SISTER'S DAUGHTER'S SON—his succession admitted in Bengal ..	498
but questionable .....	ib.
SISTER'S GRANDSON.....	499

	PAGE
<b>SISTER'S SON</b> —is a bandhu .....	493, 494
— has no right so long as a sister survives.....	494
— s take before sister's daughters .....	495
— postponed to sister-in-law .....	131
—                      cousin's son .....	349
—                      fifth descendant from grandfather .....	495
— as successor preferred to paternal aunt's son.....	ib.
—                      maternal .....	ib.
— succeeds to his maternal aunt .....	547
— heir to his uncle amongst aboriginal tribes .....	888a
<i>See</i> Adoption IV. 1029, 1030, 1034, 1037, 1066 ; Bandhu; Sapinda ; Śūdra 1037; Vaiśyas 1037.	
<b>SISTER-IN-LAW</b> —preferred to sister's son and to a male cousin... 131	
son of wife's sister may be adopted— <i>see</i> Adoption IV. ....	1064
<b>SMṚTIS</b> .....	10, 14, 25—54
— natural at a particular period of development.....	55
— enumerated .....	26
classification of — .....	31, 41, 51
— are versions not forgeries .....	50
— come nearer than the Vedas to modern practice.....	865
interpretation of — .....	53, 861b
— governed by the Mimāṃsa .....	540
<i>See</i> Interpretation.	
— are not codes but manuals .....	54, 56
— are above reasoning .....	869
rules contained in the — .....	239, 240, 242
— could not be repealed .....	880c
— rest on a religious not a utilitarian basis .....	55n
— deemed superior to usage .....	869e
— not entirely consistent.....	905a
when they conflict, Equity decides .....	11
— form one body .....	14, 861b
— are supplementary to each other .....	14, 55
— have frequently been altered .....	30
— contain much that is given in the Dharmaśāstras .....	43
which — are redactions of Dharmaśāstras .....	50
— hardly applicable to marriage relations of the lower castes .....	425
or to adoption amongst these classes.	
<i>See</i> Adoption II; IV; V. 1069, 1071, 1078; VII.	

	PAGE
SOCAGE—law of — .....	79b, 806a
SOPA CHITI—see Divorce.	
SODAKA—same as Samānodaka .....	133
SLAVE—under the old law incapable of property ... ..	271, 288, 341
SLAVERY—abolished by Act V. of 1843 .....	516
kinds of — .....	50
<i>See</i> Adoption II.; VII.	
SMṚITI CHANDRIKĀ—see separate List of Hindū Authorities, lxxvi	
SON—importance of a — .....	872, 873b, 899, 901
guardianship of a — during minority.....	1090c
<i>See</i> Age; Guardian; Minor.	
— continuator of family sacra.....	713
— procreation of a son an imperative duty ...	901h, 902, 972f
— substituted — indispensable failing one begotten	860
— a single adoption discharges the sacred debt.....	1148
— takes the place of a father disqualified or retired .....	658c
— born in wedlock is legitimate though begotten before	
it .....	340
— includes son's son's son .....	68
— entitled in extreme need to maintenance .....	263, 1242
even in preference to fulfilment of promise.....	1242
— status of — necessarily unconditional .....	1085
— not transferable like a chattel .....	931, 1075, 1076a
— can be disinherited only for adequate reasons	585, 587,
812, 873	
— but then could be replaced .....	873b
— begotten son not to be replaced according to some	
passages .....	877d
— identified with father for all lawful obligations .....	162
—'s liability to pay father's debts—see Debts 80, 161, 164,	
166, 586, 609, 642, 746b, 747, 1240	
— ————limited by caste laws .....	747a, 747b
— separated — not liable unless he inherits property.	166
— s liable to pay with interest, grandsons without.....	1241
— is represented by his father in a suit .....	616
— is bound by a compromise made <i>bond fide</i> by his father.	ib.
— becomes head of family on father's incapacity or	
retirement .....	658c
— s and father are joint owners in ancestral estate	77, 390,
585, 713, 723	
— and in property acquired by father .....	722, 723

	PAGE
<b>SON</b> —co-ownership arises only on actual birth .....	803
or adoption— <i>see</i> Adoption VII.	
— cannot contest prior alienations by father .....	803, 813
— s' ownership, according to Dāya Bhāga, arises only on the death of their father .....	598n
— not deprived of a real right by a transfer .....	7
<i>See</i> Transfer.	
— may prevent improper alienation of ancestral property by the father .....	194g, 639, 810
<i>See</i> Interdiction.	
— cannot generally charge property during father's life. 248 share of the — how far liable in execution against the father .....	618ss
— s take by representation .....	65
but not brother's sons ( <i>see</i> below) .....	111
— takes impartible estate as " purchaser " .....	162
— s succeed to an Avibhakta Grihastha .....	6b, 339
— s and grandsons take solely the self-acquisitions of the father and grandfather .....	340
— s succeed to a separated person .....	77, 355ss
separated — is preferred to father's widow... ..	357, 359, 792
— s may claim partition of ancestral property ? 171, 657, 659, 665, 796, 797, 798, 804	
many exceptions to this by caste law.....	659ss
— cannot contest a partition made before his birth .....	1229
— s cannot obtain partition in Bengal .....	163
— s cannot demand partition with grandfather against father's will .....	698b, 796
— cannot enforce partition of father's self-acquired pro- perty .....	815
— allowed to sue to establish his right in a share in- herited from his uncle by his father.....	683
— predeceased (childless); his interests merge in his father's .....	170, 341, 973g, 987
— may relinquish his share and become separate ...	340, 792
— does not thus lose his right of succession ...	357, 792, 793
— s not reunited postponed to reunited .....	140, 141
separated — s postponed to — s united or born after separation .....	68, 340, 355, 365, 776, 792, 802
importance of eldest — .....	914

178 ■



	PAGE
Sons—elder — by younger wife preferred to a younger by an elder wife (generally).....	340
See Eldership.	
— succeeds to his mother .....	512
when —s inherit to their mother .....	152
—s take unobstructed inheritance according to Vyav. May .....	111, 300, 714
See Mother.	
—s succeed to mother's self-acquired property (Bengal). 324b	
—s are not co-sharers with mother (Smṛiti Chandrikā)	108, 297d
—s are coparceners by birth.....	65, 216b
—s take equally.....	78, 362, 363
Śūdra's —s legitimate and illegitimate inherit <i>inter</i> <i>se</i> as brothers .....	383
—s cannot be separated <i>inter se</i> against their will ...	195, 665
—s of brothers of the full blood inherit .....	112
—s of half blood inherit .....	<i>ib.</i>
when —s of brothers of the — — inherit with brothers .....	<i>ib.</i>
—s of half-brothers are sapindas according to the Vyav. May. ....	113
—s of deceased brothers represent their fathers in par- tition and succession to ancestors .....	343, 828
—s take the place of adoptive father .....	81
See Adoption VII.	
illegitimate —s, not affected by their mother's connexion with other men than their father .....	385
—s in the religious sense not possible to a Śūdra .....	384
illegitimate —s of a Śūdra inherit ...72, 81, 82, 373, 375ss, 447	
—s get half-a-share if legitimate descendants are living .....	<i>ib.</i> 379, 381
illegitimate — of a Śūdra preferred to a widow and daughter .....	377
—s born in sin entitled to maintenance only .....	83, 387, 424
—s of a concubine are <i>inter se</i> brothers of the whole blood and inherit <i>inter se</i> as brothers .....	383
illegitimate —s of a European could not form a true joint family .....	4
illegitimate —s of higher castes can claim mainten- ance only .....	82, 164, 373, 377

**Sons—Subsidiary Sons.**

twelve kinds of subsidiary —s .....	892, 893
relative places assigned to the different kinds of — s .....	891, 892
division of sons into kinsmen-heirs, and kinsmen-not heirs .....	891
subsidiary —s of each class exclude those lower in the scale .....	384
—s of uncertain origin excluded from succession .....	896n
adopted sons succeed on failure of legitimate issue of the body .....	71, 81, 365ss
<i>See</i> Adoption <i>passim</i> ; Debt; Father; Gift; Illegitimate; Outcaste; Primogeniture.	
SON'S DAUGHTER—postponed to daughter-in-law .....	528
SON, POSTHUMOUS—inherits .....	140, 847
partition re-opened by birth of — — ...	703, 847
SON'S SON—'s succession to grandmother failing sons .....	512
SON'S SON'S SON'S SON—inherits as a gotraja.....	655
SON'S WIDOW—postponed to brother.....	454
SON-IN-LAW—in some tribes taken into the family of a sonless man .....	421c
affiliation of — .....	1212
—— admitted in some Narvadāri villages as successor to a proprietor.*	
<i>See</i> Ghar-Jawāhi; Ilātam 421c.	
SONĀR—see under Caste.....	505
SONIS—see under Caste .....	751d
SOURCES—see Hindū Law .....	9, 1069, lxxxv
SPARTAN LAW—comparison of — — with Hindū Law .....	289a
SPIRITUAL RELATIONS .....	187
<i>See</i> Ascetic.	
ŚRĀDDHA † .....	62
—— described .....	1147f
importance of — .....	66
separate performance of — is a sign of partition ...	689
wife's share in —s .....	93
Jains have no —s .....	901
—— forbidden to Śūdras .....	922d, 930f

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\* Bo. Gov. Rec. No. 114, p. 134.

† For the Śrāddhas in actual use *see* R. S. V. N. Mandlik's Vyav. May. Introd. pp. xxxvi ss.

	PAGE
ŚRĀDDHA—s may be performed by all castes by custom .....	922d
subordinate character of a — celebrated for mother and her ancestors.....	1069b, 1166
— in case of nephew adopted .....	1161
— by adopted son in default of original heirs.....	1162
repetition of —s a supposed ground for repeated adoptions .....	1166a
<i>See</i> Adoption II; Dharma-Putra; Property 62; Sacra.	
ŚRAUTA SACRIFICE .....	914e
ŚRĪVAKS—(Jains).....	568, 569
ŚROTĪYAM GRANT—is separate property.....	725b
— descendible to grantee's sons only .....	<i>ib.</i>
ŚROTĪYAS = learned Brāhminas .....	138
ŚRUTIS—are fountain heads of law .....	56
contents of — .....	<i>ib.</i>
— are above reasoning .....	869
STATE—the source or sanction of private property .....	178, 185
succession of — to property .....	102, 139
<i>See</i> Escheat; King; Property A; D. II. γ.	
STATUS—law of personal — dependent on religion.....	4
— of son cannot be made subject to contingencies .....	1085
<i>See</i> Adoption VII. 1145, 1156.	
STATUTES— <i>see</i> separate List .....	lxxviii
STATUTE OF LIMITATION—bars suit for partition after long separate holding .....	694
when — — operates by prescription .....	697, 701
effect of — — in a suit for partition.....	828
<i>See</i> Limitation; Prescription.	
STATUTE LAW—supersedes Hindū Law in contracts .....	7
STEP-BROTHER— —'s son } <i>see</i> Half-brother's son .....	546
<i>See</i> Brother, 545.	
STEP-DAUGHTER— <i>see</i> Daughter .....	536
—'s succession .....	518
—'s son heir to a widow .....	524
STEP-GRANDMOTHER .....	780
STEP-MOTHER—not included in the term "mother" .....	110
—'s right to maintenance or an allotment.....	472a, 653c
and to residence .....	358, 776a, 826
maintenance of — a duty of step son as well as of her own son .....	234, 678, 1181
—'s allotment.....	780c

	PAGE
<b>STEP-MOTHER</b> —her right to inherit.....	471
— excluded by Strange .....	<i>ib.</i>
— admitted by Bālabhāṭṭa .....	<i>ib.</i>
— stands next to paternal grandmother according to Mitāksharā .....	472
— postponed to half-sister .....	470
— daughter.....	433
— grandmother .....	471
— regarded as successor to step-son and his widow.	523
— adoptive— <i>see</i> Adoption VII. ....	1181
her step-son may inherit her strīdhana.....	472, 1182
—s though sonless are entitled to equal shares on partition .....	473, 820
this questioned by Vīramitrodaya .....	<i>ib.</i>
doctrine of the Vyavahāra Mayūkha .....	472
<b>STEP-SISTER</b> — <i>see</i> Sister; Half-Sister.	
—'s son is excluded by sister's son .....	495
<b>STEP-SON</b> —not entitled to succeed to his step-father .....	513
— succeeds to his step-mother .....	472, 521, 1182
as heir to step-mother postponed to husband ...	522
<b>STIPULATION</b> —by adoptive parents for annuity for giving their son, illegal .....	1087
<b>STRANGERS</b> —to agreements or awards cannot use admissions in them .....	189c
— cannot be intruded into sacred offices .....	185b
<b>STRĪDHANA</b> — <i>Different Conceptions of</i> — .....	265ss
different senses of — .....	265, 266ss
Vijñāneśvara's definition .....	266, 317, 331
Nilakanṭha's definition .....	266, 267
growth of woman's right to — .....	273ss
enumeration of — .....	267
enumeration of Manu not exhaustive .....	148
the Sarasvatī Vilāsa on — .....	333
Aparārka on — .....	780c
Nilakanṭha's classification into Pāribhāshika and other kinds.....	145, 146, 267, 518
— according to Mitāksharā .....	146, 150
— no distinction between Pāri- bhāshika and other kinds.	146
— has no technical meaning ...	147
— includes every kind of ac- quisition by a woman...	324, 329

	PAGE
STRĪDHANA—recognition of every kind of acquisition by women	
by the Court in Madras .....	330b
————— in Bengal .....	330
but restricted by decisions so as to exclude property inherited from a male .....	329ss, 332c
the female now takes but a life estate? .....	336
<i>See</i> Daughter; Female; Sister .....	449, 451, 465
distinction lately drawn between females born and those married in the family .....	337
correctness of this discussed .....	337, 338
in Bengal property inherited by a daughter from her father is not — .....	303d
nor is the share taken by a mother in a partition as representative of a deceased son .....	303e
<i>See</i> Mother.	
immoveable property bought by a widow out of savings from her maintenance is her—	315, 316, 507
if she indicates her intention of so holding it* ...	315a
so is property bought from a fund bequeathed by her husband.....	301c
<i>mode of acquiring</i> — .....	292
according to Mitāksharā .....	266, 317, 331
— gifts from parents .....	292, 514
— husband .....	293, 308, 312, 329, 341
— ornaments given for ordinary wear are — .....	310
immoveable property given by the husband is —.....	312, 326b
subject to restrictions on disposal.....	777c
a husband separate in estate can give or devise to his wife with absolute ownership .....	1113
gifts from sons, brother, and others .....	295
by inheritance 148, 149, 150, 270, 272, 295, 327, 333, 777, 780	
property inherited by a widow from her husband is — .....	329, 465
————— includes inheritance from second husband .....	513
according to the Privy Council property inherited by a woman from a male is not — and is not transmissible as her own.....	150, 335

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\* *Isri Dut Koer v. Musst Hansbutti Koerain*, L. R. 10 I. A. 150.

<b>STRĪDHANA</b> —proof that according to the Mit. inherited property is — from the case of brother's succession.....	272a, 324
from the treatment of the subject by the Vyav.	
May. ....	146, 150, 272a
the principal commentators adopt this doctrine .	332
Mit. followed by Viv. Chint. and Saras. Vil.	273,
	332, 333
doctrine recognized as that of the Mit. by the	
Vīram., Dāya Bhāga, and Smr. Chan. ....	149, 272c
wife's share in a partition is —	304c, 310, 777, 781,
	825
and a widow's share .....	304c, 310
a mother's share is — .....	327, 780c, 781a, 782
so is a sister's share .....	328, 335, 777
and a daughter's .....	298
marriage gifts are wife's — .....	283
Adhivedanika .....	268, 291
Adhyāgnika .....	290
Adhyāvāhana .....	ib.
Anvādheyika .....	146, 290, 519
Pṛitidatta .....	146, 290, 519
Saudayika .....	267
Sulka .....	290
Yautaka .....	518
nature of the woman's estate ( <i>see above</i> ) .....	297ss
gifts to a wife from strangers belong to husband	295,
	300
mother takes absolutely .....	328, 1177
so do daughter and sister.....	303, 328, 331
exception in Madras.....	303, 329d
———— — Bengal .....	330, 332
so a maternal great-niece .....	328b
mother's property in Yājñ. = Strīdhana in Mit. .	325a
wife's power to alienate controlled by husband...	92
her power of disposal over gifts, bequests, and	
heritage .....	303, 777c
her power over — (Saudayikam) unfettered	
except as to immoveables .....	92, 298, 299
according to the chief native authorities.....	297—299
over — generally except immoveables taken	
from her husband .....	300, 301

	PAGE
<b>STRIDHANA</b> —widow's estate not a trust nor an estate for life	313, 314
she represents the inheritance .....	314
widow's share in partition at her absolute disposal ?.....	303, 304c, 310
authorities discussed.....	781a, 782
daughter has full power over — devolved from	
her mother .....	303
and over her allotment in a partition .....	298, 310
or a gift from father .....	311
testamentary power as to — commensurate	
with the right of disposal during life .....	309
husband may dispose of wife's — in distress...	297
— may take — in cases of wife's flagrant	
misconduct (Vīram.) ....	297a
<i>Succession to</i> —	
the subject discussed .....	149, 327ss
— in Bombay .....	335ss
property inherited by a sister from her brother	
is — and goes to her daughters .....	465
— descends to daughters unprovided for.....	509
heirs to the different classes of —	146, 310, 325, 519
Anvādheya.....	146
Pāribhāshika.....	ib.
Pṛitidatta .....	ib.
Śulka .....	151
Yautaka .....	325
succession to — according to Śrī-Krishna and	
Vijñāneśvara .....	323, 324, 517
according to Bengal law.....	325, 514
— Jagannātha.....	326
immoveable property given by husband descends	
as — .....	326b
if an absolute estate has been given, ...	308, 312f, 1113
so as to all inheritance save from husband .....	329
contrary decisions .....	150, 335, 448, 449
rule of succession to a male applied .....	146, 150, 530
husband's sister preferred to his cousin ..	537
husband's sister's son wrongly preferred to his	
cousin.....	532, 535
widow's sapinda's inherit after husband's .....	540
<i>See</i> Adoption VII. 1175, 1180 : Daughter ; Ejectment 302a ;	
Female ; Inheritance ; Mother ; Sapinda ; Sister ; Step-	
Mother ; Succession ; Widow ; Wife ; Woman.	

	PAGE
STUDENT— <i>see</i> Fellow-Student 137; Pupil .....	500
——— to become a householder after instruction in the Veda (Manu III. 2-4) .....	873f
See Grihastha.	
STUDY—of Vedas and of Manu prohibited to Śūdras (Manu II. 16)	919e, 921
SUBODHINI—a commentary by Viśveśvarabhāṭṭa .....	17
SUBSIDIARY SON— <i>see</i> Adoption; Kshetrāja; Pūtrika Putra; Son.	
SUBSTITUTION—under Roman Law .....	319a
SUCCESSION—depends on status .....	4, 5
See Custom; Hindū Law; Lex Loci 4.	
mode of determining — in litigation .....	5
regulation of — according to the performance of funeral oblations peculiar to Bengal .....	62
division of — .....	63, 64
——— to an Avibhakta Grihastha.....	65
joint and undivided — is the rule.....	68
——— according to the Vīramitrodaya .....	137
tribal — .....	138n, 733
special rules of — .....	155, 176
——— to a rāj or principality .....	157, 735
——— —mirās .....	176
——— regulated according to propinquity .....	117a
——— differently according to various authorities	ib.
——— as affected by forms of marriage .....	538
collateral — of adopted son ...	368, 1176, 1189, 1182
——— on the death of a widow goes to her husband's heirs next to those specified .....	89
origin of — of persons spiritually related .....	63
——— not suspended for one not begotten or adopted	67,
	577, 581, 1195
——— of co-sharers impaired by adoption in a family ...	1073
——— to impartible property governed by seniority ...	69, 79
——— limited to a series of single heirs is not equi- valent to primogeniture* .....	70n
See Eldership; Primogeniture; Vatan.	
illegitimate son excluded from — .....	158
except of a Śūdra.....	72
See Illegitimate Son.	

\* *Achal Rām v. Udai Parāṭh Addiya Dat Singh*, Pr. Co. 30 Nov. 1883.



	PAGE
SUCCESSION—line of — prescribed by law cannot be altered .	178f
unrecognized—disallowed*.....	177
—— to an endowment determined by custom.....	201
—— to bhāgdāri lands in Gujarāt.....	431
females in Marāthā country not excluded from	
—— to inām property.....	ib.
<i>See</i> Female; Grant; Inām.	
—— through females only in some tribes .....	287b
—— of parents .....	448
—— on the death of mother who has inherited from	
son goes to his next heir.....	ib.
—— to undivided residue.....	702
—— to priestly offices and emoluments .....	411, 431
<i>See</i> Adoption VII. 1166, 1171, 1180, 1181, 1182,	
1189, 1195, 1196, 1197, 1202, 1208, 1211;	
Brother; Coparcener; Custom; Endowment;	
Family; Female; Inheritance; Maṭha; Priest;	
Principality 735, 736; Property; Rāj; Vatan.	
—— UNOBTAINED .....	63, 67, 140, 389
—— extends to three descendants in the male line. .	65, 68
according to Mit. and Madanapārijāta — ex-	
tends to grandsons only .....	65, 67
rules of — apply to reunited family .....	140
<i>See</i> Family; Inheritance.	
SUCCESSION ACT (Indian) X. of 1865 .....	1235
<i>see</i> Separate List, p. lxxvi.	
—— governs Native Christians .....	4
—— made applicable to wills of Hindūs.....	216
—— allows a remoter disposition than the Hindū Law.	ib.
<i>See</i> Wills.	
ŚŪDRAS—64, 72, 81, 82, 84, 86, 87, 88, 105, 140, 275, 339, 374, 386,	
415, 432, 438, 443, 453, 503, 512, 527, 546, 553, 555, 564,	
570, 572, 581, 589, 651, 775, 780, 847	
<i>See</i> Adoption II. 887, 888, 919, 921, 929; III. 951,	
959, 977, 978	
—— are Gṛihasthas .....	64a
—— excluded from duties and rights of the higher castes	
(Manu I. 91; II. 103).....	919, 921, 930, 1130
—— have not the higher sacra .....	1036

\* *Kumar Tarakeswar Roy v. Kumar Shoshi Shikhareswar*, L. B. 10  
I. A. 51.

	PAGE
<b>ŚĪDRAS</b> —cannot become Sannyāsis .....	556
— may become Gosāvis .....	553
— Vairāgis .....	572
— forbidden to study the Vedas and to perform sacrifices.....	64, 913
— <i>ex. gr.</i> the datta homa .....	920
— recite mantras .....	921
their Śrāddhas allowed, but defective...873, 919, 922 <i>d</i> , 930 <i>f</i>	
union among — not of a sacred character .....	1027
— incapable of having a son in the religious sense .....	384
— can adopt sister's son .....	1037
— daughter's son .....	<i>ib.</i>
their rules of adoption partly admitted into the Brāhminical system .....	1035
begetting a son on a — woman entails loss of caste 421 <i>h</i>	
but not mere intercourse .....	<i>ib.</i>
<i>See</i> Adoption IV. 1065, 1066 ; V. 1079 ; VII. 1187, 1188, and <i>passim</i> ; Brother ; Caste ; Ceremonies ; Custom ; Daughter ; Family ; Illegitimate Son.	
<b>SUIT</b> —mere — against one coparcener does not affect others	632
unless the coparcener is a representative.....	616
<i>See</i> Joinder 608 ; Parties ; Representation.	
representation of minor in a — .....	675
<i>See</i> Administration ; Minor 766 ; Next Friend.	
— and sale for a co-sharer's debt pass his right to share 623,	
in a — against a family all are to be made defend-	628
ants .....	636
exceptions .....	<i>ib.</i>
— by or against the father alone— <i>see</i> Father.	
— as affecting sons.....	619 <i>ss</i> , 624, 626, 629
— should name sons or specify repre-	
sentative character.....	625
a compromise by father suing held binding on sons ...	612 <i>e</i>
sale under decree against father as affecting sons 621 <i>ss</i> ,	
627	
a nephew not bound.....	625 <i>c</i>
— against a manager affects only his share.....	636
— against sons for father's debt.....	631
adopted son representative for — .....	1179
— by son against father .....	683
— for property as divided does not bar one for it as un-	
divided.....	605, 793

	PAGE
SUIT—for partition .....	763 <sup>ss</sup>
— to enforce partition deed not allowed to be changed into one for maintenance .....	780 <sup>c</sup>
— for partition by coparcener conveys no right to his widow .....	842
perhaps not even a decree? .....	<i>ib.</i>
to a — for partition by the purchaser of the father's right the mother is a proper party.* .....	
— for family idol .....	784 <sup>e</sup>
— by Sebaita .....	160
adoption pending — .....	1179
<i>See</i> Adoption VIII. ; Attachment ; Charge ; Copar- cener ; Debt ; Decree ; Family ; Father ; Guardian ; Liability ; Manager ; Obligation ; Sale.	
SUITS, POSSESSORY .....	696
<i>See</i> Possession.	
ŚULKA .....	268, 290
definition of — .....	276
kinds of — .....	277
— not the same as Morgengabe .....	278
— goes to uterine brothers .....	519 <sup>d</sup> , 277—280, 327
SUPERSTITIOUS USES—English law of — not enforced .....	215
SURETYSHIP <i>inter se</i> BY COPARCENERS—is a sign of partition but not conclusive .....	688, 850
SURVIVOR— <i>see</i> Adoption .....	993
SURVIVORSHIP—rule of — recognized .....	74
— alternative to that resting on re- cognized oblations .....	76
no — amongst daughters in Western India ...	106
— in united family .....	456
— excludes an executor .....	295
— regulates succession in a reunited family .....	143
<i>See</i> Adoption VII. 1172 ; Brother ; Coparcener ; Dāya ; Family ; Inheritance ; Property ; Succession.	
SUTAK .....	1160
SUTĀR .....	257 <sup>a</sup>
SŪTRAS .....	33—56
— are strings of rules .....	33
Āpastambha Sūtra .....	34

\* *Hurdey Narain Sahu v. Rooder Perakash Misser*, Pr. Co. 5, Dec. 1883.

	PAGE
SUTRAS—Hiranyakeśi Sūtra .....	34
— characterized by their shortness .....	44
SVAIRINĪ = disloyal wife .....	652, 882
— is one who deserts her husband and cohabits with another man .....	387
son of — occupied a place above adopted son.....	ib.
SVÂMYA AND SVATANTRATĀ .....	209
SVÂRJIT = property acquired by one's self .....	712
SVAYAMVARA .....	283
SVYAMDATTA SON—meaning of — .....	893, 1081
— not now recognized .....	895
<i>See Adoption V. 1073.</i>	
SWÂTHIS—a Himâlayan tribe .....	805a
SWEDEN—right of free occupancy in ancient — .....	734
TAILOR .....	381, 516
TANKS—when indivisible .....	730
— may be used by all coparceners by turn or agree- ment.....	784, 832
TAPODHANA CASTE.....	434
TARWÂD .....	ib.
TAULKĪYA-AODĪCHYA CASTE .....	ib.
TEMPLE ALLOWANCES—hereditary and divisible .....	742
— subject to special rules .....	ib.
<i>See Adoption III. 1068; Endowment; Nibandha.</i>	
TEMPLE PROPERTY.....	554, 555
<i>See Perpetuity; Property D. II. a.</i>	
TEMPLE SERVANT—interest of — — alienable .....	785a
TENANT— <i>see</i> Lessee; Landlord.	
— discharged by payment to one of several co-sharers...	610n
joint — has not a devisable interest under English Law.....	671n
covenant by one joint — to sell severs the joint tenancy in equity .....	705c
<i>See Coparcener.</i>	
rights of —s after a partition.....	717e
TENURE—rare under Hindû law.....	173
— of land supporting an office .....	744
<i>See Grant; Jâgir; Saranjâm; Vatan.</i>	
TESTAMENT— <i>see</i> Will.	
TESTAMENTARY POWER.....	213, 1158c
— depends on the state of the family and the nature of the property.....	171

	PAGE
TESTAMENTARY POWER—regulated by Hindû Law .....	667
—— not regulated by analogy to English law.....	181
but to the Hindû Law of gifts .....	181, 293
—— over self-acquired property absolute .....	193, 219, 312,
667 <i>n</i> , 772, 806	
limitations to this ? .....	1111, 1112
collateral heirs no bar to the exercise of the — .	195
—— not to defeat other's rights.....	219
—— ——— or claims to subsistence ...	220, 1111
—— or to make illegal dispositions .....	220
—— as to Stridhana is commensurate with the right	
of disposal during life .....	309 <i>a</i>
See Adoption III. 969; VI. 1111; Alienation; Coparcener;	
Family; Gift; Maintenance; Son; Survivorship.	
TEUTONIC LAWS—comparison of ——— with Hindû Law .....	192 <i>c</i> ,
271 <i>f</i> , 319 <i>a</i>	
TEXTS—see Interpretation.....	8
—— to be received cautiously .....	865, 866
interpretation of ——— influenced by philosophical	
systems .....	8
—— sometimes manipulated to suit later notions .....	<i>ib.</i>
—— how construed .....	199 <i>b</i> , 266 <i>n</i>
THEODOSIAN CODE—referred to .....	422 <i>b</i>
THIYENS—see Tribes .....	234, 420
TIME—see Adoption.....	964, 975, 976
TIRTH-UPÂDYA—'s right partible by custom .....	785 <i>n</i>
TITHE—see Possession .....	697
TITLE DEEDS—custody and inspection of ——— .....	797 <i>a</i>
TOPÂ GIRÂS .....	180
—— not exempt from attachment .....	775 <i>a</i>
TONSURE—period of ——— .....	929
—— as affecting fitness for adoption—see Adoption II. 928;	
III. 998; IV. 1060, 1061; VI. 1134 <i>b</i> , VII. 1160	
TOOLS AND IMPLEMENTS—when indivisible and when not ...	730, 734
—— to be kept by those having them .....	785
TOTHIYARS—see Tribes .....	419
• TRADING <i>inter se</i> BY COPARCENERS—a sign of partition—see Evi-	
dence; Partition.	
TRADITIONS—as regards the Smṛitis .....	26—28
—— untrustworthy .....	29
—— Brâhminical, about the Dharmasâstras.....	38
—— an element of customary law.....	869

	PAGE
TRANSACTION—of father how far binding on son.....	612e
———— as to admissions of an adoptive mother .....	1185
<i>See</i> Coparcener; Father; Manager; Obligation; Representation; Suit.	
TRANSFER—depends on individual will .....	59
restrictions on ——— inconsistent with estate disal- lowed .....	195, 721b
———— of Saranjâm not allowed .....	721b
different ceremonies for ——— of immoveable and moveable property.....	1213
irregular ——— by father may be prevented by son ...	810b
———— or set aside .....	813a
<i>See</i> Alienation; Gift; Grant; Interdict; Possession; Pro- perty; Sale.	
TRAVANCORE— <i>see</i> Female Gentileship 421; Polyandry .....	284
TREASURE TROVE—law of ——— .....	833
TRIBES—Bhils .....	281n
Bhooteah .....	289a
Cachâris .....	281n
Dufias .....	289a
Gâroo .....	287b, 288n, 421
Gonds .....	281n
Jâts .....	281b, 423k
Kângra tribes .....	376
Kâthis .....	281n
Khâsias .....	288n, 289a, 421
Kholls .....	281n, 282a
Khonds.....	376
Koches .....	281n, 421
Maravers .....	430a
Meeris .....	289a
Motati Kapus (Madras).....	1212b
Nairs or Nâyars.....	284b, 419h, 421, 424d, 426a
Orâons .....	281n
Pâhâns .....	ib.
Sânthâls.....	ib.
Sissee Âbors .....	289a
Talabda Kolis .....	1210
Thiyens .....	284, 420a
Tothiyars .....	419h
Vazirs .....	420f
TRIORUHA Dikshâ = consecration.....	568

	PAGE
TRUST—not unknown to Hindû Law .....	203
legislation affecting —s amongst Hindûs .....	441g
instances of —s .....	203, 204
native usage determines whether a — has been created .....	205
— may be annexed to gift .....	441
— to husband for wife .....	203
— for daughter .....	204
— not allowed to create a perpetuity for a family or an estate .....	203h
— dissoluble only by assent of all interested.....	ib.
—s uncertain and illegal ineffectual .....	203, 205
—s how dealt with .....	204, 205
charitable —s enforced .....	215d
enforcement of —s.....	204, 441
religious and charitable —s common .....	203
— treated with special favour by Hindû Law.....	216
— in favour of an idol .....	160
heritable — may be resigned by father to son .....	553
— not to be altered in constitution by majority.....	ib.
property transferred by a Mahant by a breach of — can be recovered .....	188f
beneficiaries may sue for the enforcement of the duties of — .....	398
subject to the consent of Advocate General or his substitute .....	ib.
<i>See</i> Endowment ; Gift 441 ; Grant ; Property D. II.	
TRUSTEE—of a religious endowment cannot alienate or encum- ber it except under special circumstances.....	555d
<i>See</i> Endowment.	
widow is not a — for son to be adopted.....	1218
but continuing a suit after adoption may be deemed a trustee .....	ib.
the possessor of land who has settled for assessment is — for owner .....	722a
UNCERTAINTY—vitiate a trust.....	203
UNCHASTITY—makes a woman only temporarily impure .....	885a
— disqualifies mother from inheriting to son.....	591
— does not prevent inheriting from maternal grand- mother.....	ib.
— disqualifies daughter from inheriting .....	154c
but not among Lingâyats .....	591

UNCHASTITY—disables a widow for inheriting from her husband	
or son .....	590, 591
but subsequent — does not divest a widow's	
estate .....	89, 591
<i>See</i> Widow.	
— prevents one widow getting her share from the	
other .....	591
— of widow opens daughter's right to inherit .....	<i>ib.</i>
— causes forfeiture of the right to main-	
tenance .....	592
maintenance allowed resumable on — .....	<i>ib.</i>
UNCLE—as manager ; presumption in favour of his transactions.	637
— may be commissioned by sister to give nephew in	
adoption .....	1079
when — succeeds to nephew .....	351, 473, 474
paternal — succeeds to niece.....	546
maternal — postponed to the widow of the paternal	
uncle.....	131, 132
— inherits as bandhu .....	135, 136, 495
— inherits as a bhinnagotra sapinda.....	490
— preferred to maternal aunt's son .....	492
<i>See</i> Adoption II. 898 ; IV. 1025 ; Ne-	
pew.	
UNCLE'S (PATERNAL) DAUGHTER'S SON—an heir according to	
Bengal Law .....	491b
UNCLE'S (PATERNAL) GRANDSON .....	481
UNCLE'S SON .....	474ss, 546
<i>See</i> Adoption IV.....	1033
UNCLE'S (MATERNAL) SON—is a bandhu.....	493
— succeeds to a woman .....	547
UNCLE'S SON'S WIFE .....	485
UNCLE'S (PATERNAL) WIDOW—her succession .....	484, 485
different law of N. W. Provinces .....	485
UNCLE'S WIFE— <i>see</i> Widow of Paternal Uncle.	
UNDIVIDED FAMILY— <i>see</i> Family.	
UNION, SPIRITUAL .....	1082
UNITY OF ESTATE—presumed in a united family .....	729
<i>See</i> Family, Joint ; Presumption.	
UNIVERSITAS .....	162, 165, 213
UNMARRIED FEMALE— <i>see</i> Daughter ; Female ; Sister.	
UNMARRIED MAN—may adopt— <i>see</i> Adoption II. 905n, 918, 919 ;	
III. 943c	



	PAGE
UNMARRIED SON— <i>see</i> Adoption III. ....	984
UNOBSTRUCTED OWNERSHIP—its character .....	104, 333c
<i>See</i> Dāya.	
————— of a son in his mother's estate asserted	
and denied .....	300a, 711ss
UNOBSTRUCTED SUCCESSION— <i>see</i> Inheritance; Succession.	
UPĀDHI.....	186
UPAKURVĀṆA— <i>see</i> Brahmāchārī.	
UPANĀYANA— <i>see</i> Adoption III. 899b; IV .....	1062, 1063, 1065
meaning of — rite .....	1059g, 1129
no — ceremony in many castes.....	1061
UPANISHADS .....	55
USAGE—importance of — .....	2
— tends to conform to received Scripture standards .	9, 425,
426, 867	
— governs inheritance, partition, and adoption .....	7
— is to be followed failing statute law .....	7, 867
caste — approved as to the members of families.*	
gentu — to govern succession and contracts of Gentus.†	
<i>See</i> Adpotion IV. 1067; VI. 1106, 1115; Custom 199.	
UŚANAS— <i>see</i> Inheritance .....	271, 732a
— Dharmaśāstra .....	36
VADILKI— <i>see</i> Eldership.....	736
VĀGHREE CASTE .....	249a
VAIRĀGĪS— <i>see</i> Gosāvis .....	574
who are — .....	572
position and rights of — with respect to tem-	
ples .....	ib.
— sometimes hold temple property like Mahants .....	ib.
— may retain their property .....	573
— may marry .....	575
VAIŚNAVAS—have forged some Smritis.....	52
VAIŚVADEVA = food oblations placed in fire.....	689, 840, 850
separate performance of — may be a sign of	
partition.....	689
but is not conclusive.....	689, 851
VAIŚYAS—said to have disappeared.....	921b
a class of Grihasthas .....	64
— may become Sannyāsīs .....	552

\* St. 21 Geo. III. Ch. 70, Sec. 18.

† ————— 17.

	PAGE
VAIŚYAS—can adopt sister's son.....	1037
See Adoption III. 951.	
VALOUR—gains of — as separate property compared with <i>peculium castrense</i> .....	724b
VAMŚA-PARAMPARÂ = lineal succession not collateral .....	463
VÂNAPRASTHA .....	552e, 562, 566
VANDI CASTE .....	394
VANĪ CASTE .....	411, 508, 523
VASISHTHA DHARMASŪTRA.....	34, 45, lxxvi
————— has been recast .....	35
See Adoption V. 1069, 1070, 1072; VI. 1125.	
VATAN—nature of — .....	173, 745, 846n
law relating to —.....	845, 846n
— compared with a fief .....	846n
succession to — .....	742, 744b
devolution of — is governed by special law .....	179
females can succeed to a — .....	343a
— not presumably impartible .....	342a
Deśgat — is partible .....	397
— of a Kulkarni.....	354, 438, 487, 510
— Desaigiri .....	451
— Yardi .....	354
Zamindâr's — is divisible .....	730e
— Patilki .....	384
— Joshi .....	487
— once aliened or divided is freed from special rule of descent .....	744b*
— subject to statute .....	179
profits of a vatandâri village may be divided.....	786
impartible — does not become partible by disuse of services .....	742
VATANDÂR JOSHI—see Joshi .....	398
VATANDARS' ACT—(Bo. Act. III. of 1874) see separate List of Acts .....	lxxviii
VATANDÂR VILLAGE—see Distribution ; Vatan.	
VATSA .....	1078
VAZIFA—see Allowances.	
VAZIRS—see Tribes.....	420f

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\* Subject to Bombay Act III. of 1874 and other statutes.

	PAGE
VEDAS—the fountain of intellectual life in India .....	53
— the remote fountain of law .....	56
— superior to custom.....	867
the four — .....	56
each of the — consists of Mantras and Brâhmanas..	56
antiquity of — .....	939b
— of little importance as a direct source of modern law...	56
character of their different parts .....	ib.
— not to be recited by the Śâdhas .....	1136
— nor by a boy uninitiated .....	1241
VEHICLES—when indivisible and when not .....	730, 734
— to be kept by those having them .....	785, 831
VERSION OF NÂRADA—discussed .....	48, 49
VESTED INTEREST—see Adoption III. ....	982ss, 992
VESTED REMAINDER—see Remainder .....	97, 98
VIBHAKTA GRÎHASTHA.....	58, 64, 77—138, 355—499
VICE—as a ground of disinheritance.....	154, 752a
VIDYÂDHYAYANA .....	32
VIJÑÂNEŚVARA .....	15, 1075
age of — .....	17
VINIYOGA—a disposal of widow by husband's family.....	410, 753c
VĪRAMITRODAYA—is a commentary by Mitramiśra .....	21
VĪRA ŚAIVA .....	568
VISHNU SMṚITI .....	35, 39
VIŚVEŚVARA (BHAṬṬA) .....	15
— is the author of the Subodhini .....	17
VOLITION—how far — passes property .....	7
VRITTI—meaning of — .....	741d, 834b
— is a family estate subject to inheritance and partition.	411
— is heritable.....	714a
Yajamâna — .....	348, 410
— is partible.....	397, 730c, 741d, 785n, 842
Bhaṭṭ's — is divisible .....	730c
— inalienable outside the family .....	411
widow may alien — for necessary sustenance.....	431
mortgaged — sold in execution of a decree .....	741
intruder into a — is liable for damages .....	411
each invasion of a — is a fresh cause of action.....	345a
whether the representative of a priestly family can	
sue his Yajamâna.....	411
widow may alien — for necessary sustenance .....	431
VYÂHṚITIS = mystic formulas of sacrifice .....	1125

	PAGE
VYĀSA .....	1078
VYAVAHĀRA MAYŪKHA—ranks above the Mitāksharā in Gu-jarāt.....	11, 117
—— is the sixth Mayūkha of Bhagavanta Bhāskara...	19
—— composed by Nīlakaṇṭha .....	ib.
—— dedicated to king Bhagavantadeva .....	ib.
—— must in some places be explained by the Dvaita-nirṇaya .....	20
WATAN—see Vatan .....	179
WAYS, COMMON—when indivisible.....	730
—— may be used by all coparceners .....	784, 831
WELFARE, SPIRITUAL—see Adoption I. 872, 873; V. ....	1077
WELLS—when indivisible .....	730
—— may be used by all coparceners.....	784, 831
use of — as appendant to share of property.....	831, 832
WHOLE BLOOD—limit of the preference of the — over the half-blood .....	125
WIDOW—	
<i>Position under the Religious Law.</i>	
——'s moral unity with her husband .....	90, 420
—— may perform the Kṛiya and Śrāddha of her husband in the absence of son.....	93, 872e
—— (patni) answerable for sacrifices to her husband's manes .....	258
<i>See below.</i>	
life of a — a prolongation of her husband's for determining the successor to the estate .....	89
—— regarded as part of the <i>familia</i> of the deceased .....	417
sale of — by husband's family (Panjāb) .....	426e
or by her father or brother.....	423b
—— is the guardian of her minor adopted son .....	371
<i>See Adoption ; Guardian ; Minor.</i>	
—— as manager for her son or his widow ...	367, 368, 611, 1185
<i>See Adoption VII. ; Manager ; Ratification.</i>	
taking of — by brother-in-law .....	420ss
<i>See Levirate.</i>	
<i>Rights to Maintenance.</i>	
—— entitled to maintenance in husband's family... ..	68, 77, 79, 163, 192, 233, 346, 348, 356, 653d, 753, 755, 853, 854
——'s right an inchoate right realized on partition.....	192, 244
—— in united family entitled to maintenance.....	244

	PAGE
WIDOW—'s right not dependent on ancestral estate.....	249n
so under caste laws .....	ib.
whether the right is a charge on the estate .....	80
— not strictly an interest in the estate .....	253, 259, 260
— not impaired by her possession of jewels .....	755c
— cannot be deprived of this right by agreement with her husband.....	79, 192
— cannot release or resign her right .....	79, 192, 253
— cannot be deprived of her right by alienation.....	392, 414
nor deal with it by anticipation .....	192, 253
but may deal with specific allotment .....	253
or charge decreed ? .....	254
maintenance of — by adopted son.....	1146
— daughter-in-law .....	1147
— not entitled against members separated from her hus- band or without ancestral estate .....	236
— of separate Hindû once thought entitled to mainte- nance by his family .....	235
this decision disapproved .....	236, 244
— of reunited coparcener must be maintained .....	144
arrears of maintenance may be awarded or not .....	262
— must be supported by brothers failing husband's family .....	753b
—'s right cannot be attached .....	261
but arrears awarded can .....	262
limitation to suit for maintenance .....	261
purchase with notice of her right .....	80
maintenance of — commutable to a share .....	244
but claimable in every case .....	245, 246, 252
duty to maintain — avoided in some castes by giv- ing license to remarry .....	418a
husband's debts have preference over her right .....	259
the Śâstris make the right depend on residence in the family .....	256, 259, 757, 781
so the Vyav. Mayûkha and Viramitrodaya .....	254, 257
so do the caste laws.....	257a
but separate maintenance may be claimed .....	260, 261
only on refusal or failure by the family ?.....	258
decision of the Judicial Committee that it may.....	257
— High Court, Bombay.....	757

## PAGE

<b>Widow</b> —the right to an allotment in strictness limited to the	
patnt .....	258
cases on the subject discussed .....	256ss
distinction of Bengal Law as to the right of — to	
maintenance .....	257
right of a —ed daughter-in-law— <i>see</i> Daughter-in-	
law; Maintenance.	
<i>Right to Residence.</i>	
— of coparcener entitled to residence in the family house	68,
77, 79, 252, 734, 826, 853, 854	
— not deprived of her right by a sale .....	79, 252, 345, 734
nature of the right .....	252g
— ought to reside with son.....	255
— entitled to residence as against adopted son .....	1180
residence as a condition may be dispensed with occa-	
sionally .....	255, 256, 260
as in case of ill-treatment .....	255, 260
— not compellable to reside .....	260
—'s leaving her husband's family revolting to Brahma-	
nical morality .....	419
<i>Position under the Law of Inheritance.</i>	
heritable rights of a — derived from a moral unity	
with her husband .....	90
and her participation in husband's sacrifices .....	420
— regarded as taking by survivorship? .....	1158
amongst the lower classes her right depends on cus-	
tom .....	426
— postponed to mother by some caste customs in Guja-	
rât.....	392, 404
and amongst Khojas .....	157
— takes husband's estate by inheritance .....	95
not as a trustee .....	95, 314
— fully represents the inheritance.....	313, 391
—'s estate discussed.....	312, 313, 320
— compared with that under Teutonic Laws.....	319a
— under decisions anomalous .....	452
—'s accumulations remain her absolute property though	
invested in land.....	314, 315
<i>See Accumulations; Stridhana.</i>	
— not a tenant for life .....	313
in what sense — has a life estate .....	314
— may exercise right of pre-emption .....	313d
— must protect the estate as well as represent it ...	96a, 322

	PAGE
Widow—must make good her transactions out of her property	323
ornaments of — not partible .....	735a
<i>See</i> Ornaments.	
— succeeding to her husband's share of a Mahal is entitled to a partition of her share .....	402a
<i>Inheritance in Joint Family.</i>	
— cannot claim joint property against surviving members .....	68
— has no estate in joint family property 68, 345, 346, 351, 352, 353, 405, 458, 843	
— of a joint cousin succeeds in preference to distant separated relations .....	486
— of the last survivor of coparceners inherits 345, 400a, 440	
— as last survivor of a branch takes estate as separate property .....	456
— of a collateral does not take absolutely ? .....	486
<i>Inheritance in Divided Family.</i>	
— takes husband's property in a divided family.....	269, 406
— of separated coparcener takes his share .....	654a
— succeeds to her son's property on the same terms as to her husband's .....	150
— preferred to daughter-in-law .....	508
— takes in preference to a remote heir .....	128b
— of a predeceased son inherits after the paternal grandmother according to Bālabhāṭṭa .....	128
— she is postponed to a brother .....	454
— of the paternal uncle takes as a gotraja sapinḍa ...	131, 484
— of last of a collateral line takes her husband's place	128b, 486b
— postponed in N. W. Provinces to aunt's sons ? .....	485
— of sapinḍa postponed to sapinḍa of same propinquity as her husband .....	475
— of descendants and collaterals inherit immediately after their husbands (in the absence of a male of the same branch ?) .....	132
— of brother's son preferred to another brother's great-grandson.....	132b
— of a Śūdra postponed to illegitimate son.....	85
— and to daughter and daughter's son .....	ib.
— succeeds to a fellow-widow .....	523
— two or more —s, nature of their succession .....	651

<b>WIDOW—two or more —s may divide, though authorized</b>	
to adopt .....	1217
inherit equally .....	89
may divide the estate according to	
Vyav. May., Viram., and Mit. ....	89, 103
this doctrine recognised by Courts in Bombay .....	103
— bound to pay husband's debts .....	102
— can be sued only by the nearest reversioner .....	97
— may be sued by remoter reversioners for sufficient	
cause .....	ib.
— may relinquish her right in favour of second "rever-	
sioners" with the consent of the first ?.....	96, 100
reversioners cannot obtain a declaration of right dur-	
ing life-time of the — .....	96
competition between — and holder of a certificate	
of administration .....	391
<i>Power of Disposal and Relinquishment.</i>	
what estate — takes by inheritance.....	98
as to immoveables .....	ib.
— moveables .....	ib.
her estate in a gift or bequest from her husband simi-	
lar .....	320
unless expressly enlarged .....	312f, 777, 1113
restrictions are inseparable from widow's estate 102,	782d
—'s powers not enlarged by absence of "reversioners" 102	
growth of restrictions traced.....	306
only two texts bear on her power over inheritance...	305
— may give away property inherited from husband	
(Śāstri) .....	305a
except for improper purposes.....	ib.
or immoveables.....	305a, 309, 312, 317
—'s power of disposal absolute by custom in absence of	
male kindred.....	782d
<i>See Custom.</i>	
— cannot bequeath inheritance ? .....	309, 486
—'s right over money given for maintenance absolute ...	311
— may dispose of her —'s estate .....	101
— may dispose of immoveables bought with her move-	
ables.....	323
<i>See Accumulations.</i>	
— may alien a vṛitti for necessary sustenance.....	431
— cannot dispose of immoveables without great necessity	394



- PAGE
- WIDOW— cannot dispose of immoveables by mere gift.....101, 312f  
 — may sell or incumber husband's estate for some purposes.....99, 100, 102g, 322, 395  
 as to pay husband's debts ..... 102, 395  
 but not beyond her life-time without a special justification.....101, 306ss, 317, 395, 777  
 mere recital in the deed of sale of the object not sufficient proof of it ..... 102  
 concurrence necessary of relations interested ..... *ib.*  
 — as manager cannot alienate without necessity..... 367, 611  
*See Adoption VII. VIII.*  
 — cannot transfer family jewels as her separate property 310  
 her complete ownership in moveables ..... 312, 314, 777  
 subject to husband's debts ..... 314  
 purchaser in good faith from — protected ..... 101  
 duty of the creditor of — .....101d  
 fraud on expectant heirs defeated..... 322  
*See Gift; Stridhana; Wife; Will.*  
*Loss and Destruction of her Right.*  
 adultery bars the succession of a — ..... 89, 589  
 right to maintenance forfeited by her unchastity ..... 592  
 even an allowance assigned to — for maintenance  
 is resumable in case of her unchastity..... *ib.*  
*See Forfeiture; Unchastity.*  
*Succession to Widow.*  
 — of the nearest male sapinda of a predeceased husband  
 is an heiress of a deceased — ..... 104, 132b  
 after —'s death estate not liable for her debts ..... 102  
*See Daughter; Female; Sapinda; Son; Stridhana; Succession.*  
*Partition.*  
 — cannot claim a division in Bombay ..... 360, 677, 845  
 but may in Bengal ..... 678  
 — is entitled to a share on partition among her sons ... 356  
 —'s share on partition not to be defeated .....664a  
 —'s right over share in partition absolute .....307, 310, 321a  
*See Female; Mother; Partition; Stridhana.*  
*Under the Law of Adoption.*  
 position of — until adoption ..... 367, 392  
 —'s right and duties as to adoption—*see Adoption passim.*  
 — must adopt a boy designated by her husband ..... 904b

	PAGE
WIDOW—in Bombay adopts without express power, but cannot be compelled .....	392, 904
the elder of two widows has a preferential right of adoption .....	977
gift made by — before adoption set aside .....	367
but alienation for value upheld .....	368
settlement on — with concurrence of adopted son upheld .....	1229
provision for — in cases of adoption .....	1101ss
—'s right to maintenance secured in awarding property to adopted son .....	1180
— of adopted son predeceased entitled to maintenance ...	1174
— of son cannot be divested of her estate by adoption by a mother .....	100, 998
— cannot continue suit for adult adopted son against his will .....	1232
<i>Remarriage.</i>	
— remarrying is deprived of inheritance from her first husband .....	101, 430, 590
but forfeits only the right actually inherited, not her right of inheritance to her son then living .....	110
remarried— can now inherit to her second husband .....	88, 413, 426
————— entitled to maintenance .....	360
— contracting, remains liable after remarriage .....	91e, 414
WIDOW OF COUSIN—preferred to widow of cousin's son .....	485
WIDOW OF GRANDSON—is excluded by daughter's son .....	445
but preferred to son's daughter .....	128b
WIDOW OF NEPHEW—preferred to brother's great-grandson ...	132b
WIDOW OF PATERNAL UNCLE .....	483
WIDOW OF UNCLE .....	485
————— excluded by sister .....	464
WIDOWER .....	943
WIFE—capture of — see Capture ; Marriage.	
purchase of — disapproved .....	376
See Bride-Price 273.	
purchase of—still prevails amongst the lower castes .....	423
amongst them she is regarded as property .....	420, 426e
purchase or hiring of another man's — formerly allowed .....	883a
— completely passes into her husband's family by marriage .....	91

	PAGE
Wife—shares the benefit of husband's sacred fire .....	93
— first married takes precedence over others.....	886
— of different caste once allowed (Manu II. 238; III. 12)	
— now disapproved except by special custom .....	826, 426d
— importance of the — .....	90
— ——— of the patni .....	93
— position of pāt and lagna — .....	413ss
— may be discarded amongst the lower castes...376, 423—425	
— repudiation rare in practice .....	425
— allowed only in case of an outcaste .....	376, 593b
— marriage of a second — no ground for desertion ...	425
— become a widow may perform Kṛtya and Śrāddhas in	
— default of a son.....	872e
— exequial ceremonies of — performed by her hus-	
— band's family .....	93
— her duty to live with husband not enforced where	
— dangerous .....	91c
— in some castes may desert her husband with sanction	
— of caste .....	423
— this disallowed by the Bombay High Court .....	424
— deserting husband without sufficient cause not en-	
— titled to separate maintenance .....	425, 592, 593
— person harbouring run-away — liable to suit by	
— husband .....	425
— is subject to her husband's control even as to her	
— Stridhana.. .....	92, 323
— simple disobedience does not disable the — from	
— inheriting .....	429
— general incapacity of — as to contracts.....	253, 254
— exception of contracts jointly with husband .....	91c, 414
—'s authority as to household expenses .....	92a
— annulled by adultery .....	ib.
—'s property becomes her husband's .....	253
— as <i>ex. gr.</i> earnings by service.....	292
—'s contract with husband void.....	254a
—'s separate property— <i>see</i> Stridhana .....	91c
— rights of the — in her husband's property ...94, 95, 392	
—'s right and husband's not mutual.....	92
— is a subordinate co-owner with husband.....	392
—'s interest in husband's property distinguished from	
— son's .....	1169
— entitled to a provision .....	194, 263, 392

	PAGE
WIFE—though put away .....	941a
— from whom entitled to support.....	232
— of a disqualified person entitled to maintenance on partition .....	753
claim of — to support not extinguished by allotment to her of a share .....	793
— cannot be deprived of maintenance by husband's alienation .....	392
—'s right to maintenance not subject to disposal or release.....	263
but may be defined .....	ib.
See Maintenance.	
— under gift from husband takes moveables absolutely, immoveables for life .....	308, 309, 310, 312f
but a heritable right if expressly given.....	312f, 777c, 1113
gift in case of two wives .....	312
— inherits to her separated husband .....	406
See Widow.	
what — can inherit.....	86, 93, 258, 421
wives of ancestors to the 7th degree succeed to their descendants .....	127
— for unauthorized acts liable in Stridhana .....	92
and when needlessly living apart ...	91e
but not in person .....	92
— may eject husband from her separated property .....	302a
See Adhivedanika.	
lands purchased out of separate funds saleable by—	323
and devisable .....	ib.
—'s succession to co-wife .....	518
See Adoption <i>passim</i> ; Bride ; Female ; Gift ; Inheritance ; Maintenance ; Partition ; Sapinda ; Will ; Woman.	
WIFE'S BROTHER—see Adoption IV. ....	1033
WIFE'S SISTER'S SON—see Adoption IV. ....	1031
WILL—History and Development.	
origin of the Law of —s .....	181
recognition of —s .....	667b
definition of — (in Mofussil) independent of Act X. of 1865 .....	225
absence of —s under Hindû Law.....	213ss
—s disapproved by native judicial officers .....	667b
and by the castes when the testator has issue .....	668n

- WILL—allowance of —s a development of principles of the  
Hindû Law.....181, 182  
unlimited — opposed to Brâhmanic family system ... 667b  
comparison between the Hindû and English Laws of  
—s .....182, 670  
first intention of Roman —s ..... 214  
comparison of the Roman, Athenian and English Laws 214  
extent of power limited by the Hindû Law of gifts. 667, 668  
*See below.*
- as to property at testator's disposal operates in  
analogy to gift ..... 178, 181, 182  
bequest by husband to wife treated as a gift. 312f, 777c, 1113  
*See Bequest; Wife.*
- speaks at the death of testator ..... 179  
woman's testamentary power equal to that of aliena-  
tion ..... 309e, 777c  
*See Female; Stridhana.*
- by a widow in Bengal ..... 184  
daughter's testamentary power..... 667  
Indian Statutes as to —s discussed ..... 224  
effects of Act XXI. of 1870 and V. of 1881 on—s. 224,  
225, 668, 669a  
executors excluded by survivorship..... 225  
*Forms.*  
form of a — according to Hindû Law .....222, 223, 668a  
nuncupative — .....668, 813  
attestation of — under Hindû Law intended to be  
assent to the transaction ..... 223  
*Extent of Operation.*  
power of bequest limited by power of alienation ..... 225
- does not go so far.....1169a  
subject to rights of maintenance ..... 225
- s valid which provide for maintenance of family..... 640  
uncertain — void..... 668  
application of Indian Succession Act to —s .....668, 670  
control by — of property bequeathed limited 178, 181, 228
- with a condition against alienation operates, but the  
condition is void ..... 188
- s can only confer estates and interests recognized by  
law .....178, 183, 225
- of ancestral property disallowed ..... 667

	PAGE
WILL—cannot be made of an undivided share.....	221c
—— of self-acquired property now recognized.....	181
—— fails in favour of persons not in existence at testator's death.....	182
or of persons not ascertainable at testator's death .....	670, 1233
effect to be given to a —— if reasonably possible.	183, 229
effect of a —— on the mutual relations of persons taking under it.....	195, 196, 226
bequest for specific charity maintained .....	230
<i>cy près</i> doctrine admitted.....	230a
private perpetuity disallowed .....	230, 668
even under colour of religious endowment .....	668
a charitable perpetuity may be created by —— in the Mofussil .....	226
but not it seems in Presidency towns ? .....	<i>ib.</i>
bequest may be made to a boy designated for adoption.	904
—— to two simultaneously adopted held void ...	1222
adoption by —— not allowed .....	1127c
disinheritance of a son by —— not feasible under the Mit. law .....	1113i, 1173a
even of posthumous son .....	1182*
principle applied to adopted son.....	1107, 1182
—— disinheriting a widow disallowed by the Śāstris .....	1158c
—— partly disinheriting daughter approved by Śāstri .....	435
so as to one devising part should there be no son.	640, 1107
See Coparcener ; Family ; Father ; Illegal ; Perpetuity.	
<i>Construction.</i>	
interpretation of Hindū ——s.....	183, 184, 228, 229
—— governed by Hindū Law ..	228, 668
—— Tagore case.....	224
English words not to be construed by vernacular equivalents .....	229a
<i>Proof.</i>	
custom governs mode of proof of ——.....	223
<i>Evidence of.</i>	
proof of instrument by single witness by assent .....	<i>ib.</i>
See Evidence.	

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\* In the reference to H. H. Wilson's works, p 1183a, supply "vol. V."

	PAGE
WILL—validity of — whether adjudicable on application for certificate of administration ..... 1232, 1233 probate needless in Mofussil ..... 226, 669 powers of the different courts ..... 669 opposition to grant of probate to adopted son not competent to creditors of next heir ..... 1233 <i>See</i> Adoption III. 964; VI. 1107, 1127; VII. 1157, 1158; Female; Interpretation, Maintenance.	
WILL TO EFFECT SEPARATION—when expressed ..... 680 — when implied ..... 687	
WITNESSES—testimony of — proves partition ..... 854 <i>See</i> Assent; Attestation; Evidence.	
WOMAN—never independent ..... 301ss — should perform sacrifices vicariously ..... 920 gradual elevation of the position of — ..... 419ss — in Panjâb does not transmit right of succession to village lands ..... 430 — excluded from inheritance to land under Salic and Burgundian Laws ..... 88a property acquired by a married — usually her hus- band's ..... 91 — by partition, gains full ownership according to Cole- brooke ..... 310 and according to Mit. by inheritance ..... 331 contracts made by a — jointly with her husband bind her Strîdhana ..... 91e, 414 — contracting as a widow remains liable after remar- riage ..... 91e her ownership of Strîdhana subject to qualifications.. 92 adoption of — under Roman Law ..... 932c <i>See</i> Female; Ornaments; Strîdhana; Widow; Wife, &c.	
WOMAN'S PROPERTY— <i>see</i> Female; Strîdhana; Widow; Wife, &c.	
WORKS—Hindû Law — ..... 10, 18, 862ss, 1072 their relative position ..... 11 list of references to — ..... lxxix, lxxxvi	
WORSHIP—place of — not divisible ..... 817 division of place of — by turns of occupation ..... ib. division of right to — ..... 784, 785m worshipper at a temple, his position ..... 555	
WUTTUN— <i>see</i> Vatan.	
YAJAMÂNA— <i>see</i> Priest ..... 714	
YAJAMÂNA VṚITTI ..... 348, 410	

	PAGE
YĀJÑAVALKYA—Institutes of — .....	12, 13, 41, 47
difficulty of understanding — .....	44
<i>See</i> Inheritance 271.	
translations of — Bk. II. v. 47, 50, 175.....	1239, 1241
YAMA .....	37
YARDĪ VATAN— <i>see</i> Vatan.	
YĀSKA—author of the Nirukta. ....	37, 38
YATI—heirs to a — .....	144, 568
<i>See</i> Sannyāsi 59, 144.	
YAUTAKA .....	519
<i>See</i> Stridhana.	
YELLAMĀ .....	527b
YOGI— <i>see</i> Caste .....	798
ZAMINDĀRI—once aliened or divided is freed from special rule	
of descent .....	744b
income of — chargeable with debts .....	161
— held not attachable after Zamindār's death .....	<i>ib.</i>
inheritance to — resembles that to a principality. ....	739
— governed by family custom.....	<i>ib.</i>
statement of succession to — extensively construed .....	743
— inherited through mother not self-acquired property.....	714
<i>See</i> Custom; Inām; Principality; Rāj.	











